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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1542

VESCO & CO., INC.,
Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. _____

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vesco & Co., Inc., respectfully prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on January 15, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, 490 F.2d 1334 (2d Cir. 1974), appears at p. 1a of the Appendix hereto. The Orders of the United States District Court for the Southern District of New York, Judge Charles E. Stewart, Jr. presiding, dated July 3, 1973, as well as the Findings of Fact and Conclusions of Law of the same date, also appear in the Appendix commencing at p. 47a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on January 15, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Were the District Court's purported "Findings of Fact and Conclusions of Law" improperly issued, and were they in any event erroneous and should be set aside, where they vitiate the fundamental principles of due process of law which are guaranteed to every litigant?

2. By not setting aside the proposed "Findings of Fact and Conclusions of Law," has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or at least so far sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision?

3. Did the Court of Appeals err in affirming the District Court's denial of petitioner's motions to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of process, and failure to state a claim upon which relief can be granted, and by so deciding, has the Court below made a decision in conflict with decisions of other courts of appeals, as well as those of this Court?

4. In affirming the District Court's granting of an injunction against the use, disposition, transfer, etc., of petitioner's primary asset, has the Court of Appeals placed itself in conflict with the decisions of other courts of appeals, as well as with those of this Court, in that the respondent failed to meet its burden of proof and establish the need for such relief?

STATUTES AND REGULATION INVOLVED

This is an action based upon alleged violations of the Securities Exchange Act of 1934 (15 U.S.C. §78aa *et seq.*) and Rule 10b-5 (17 C.F.R. §240.10b-5) of the Securities and Exchange Commission (109a), which is promulgated pursuant to the authorization contained in Section 10(b) of the 1934 Act [15 U.S.C. §78j(b)] (108a). Jurisdiction is asserted by respondent based upon Section 27 of the 1934 Act (15 U.S.C. §78aa) (107a).

STATEMENT OF CASE

1. Basis for Federal Jurisdiction and the Institution of the Action

Respondent, International Controls Corp. (hereinafter referred to as "ICC"), instituted this action on June 7, 1973. The complaint generally alleged that many of the named defendants, although not this petitioner, did by means of interstate commerce and the national securities exchanges defraud respondent and its stockholders in violation of the Securities Exchange Act of 1934 (15 U.S.C. §78aa). This alleged violation of the securities laws is the sole basis for federal jurisdiction in this case.

The allegations of the complaint relate primarily to two main areas, namely, certain transactions by those designated in the complaint as "Vesco and his group" and certain named aiders and abettors regarding assets and funds of I.O.S. and other related companies, and certain other transactions by the same individuals regarding a Boeing 707 jet plane. Petitioner is named in the caption of this action (99a), and is "identified" in paragraph 5(r) of the complaint in the recital of *dramatis personnae* (105a), but is nowhere again mentioned throughout the entire 27-page complaint.

With the exception of certain allegations involving a Boeing 707 airplane, which relate primarily to defendants, Fairfield Aviation Corp., Fairfield General Corp., Skyways Leasing Corp., and Alwyn Eisenhauer, and which clearly do not involve petitioner, all of the remaining allegations contained in the complaint allege wrongs over a time period prior to the date on which petitioner was even formed.

Petitioner is a Delaware corporation formed on July 12, 1972, as the final implementation of an estate planning

technique which had been originally formulated as early as 1968 by counsel for the Vesco family in conjunction with the accountants. It was created at that particular time as a direct result of certain tax rulings received from the Internal Revenue Service on April 26, 1972 and July 21, 1972, under which the viability of the company as an estate planning technique was established.

The primary asset of petitioner is ownership of shares of the common stock of respondent. Petitioner's stock, in turn, is owned as follows: the preferred stock is held by Robert L. Vesco and the common stock—the only voting stock—is owned by Patricia J. Vesco as custodian for her children.

The petitioner is not now, nor has it ever been, licensed or authorized to do business in the State of New York; it has never done any business in New York; and it does not, nor has it ever maintained an office in New York.

2. The District Court Proceedings

On July 3, 1973, the United States District Court for the Southern District of New York (Hon. Charles E. Stewart, Jr. presiding), entered two orders granting various preliminary injunctive relief and denying petitioner's motion to dismiss the complaint on various jurisdictional grounds and for failure to state a claim upon which relief can be granted.

Specifically as they pertain to petitioner, the orders preliminarily enjoined petitioner from (a) "prosecuting or taking any steps in furtherance of an action entitled *'Vesco & Co., Inc. v. Laurence B. Richardson, Jr., et al.'*, Docket No. C-3448-72, pending in the Superior Court of New Jersey, Chancery Division, Bergen County," pending final

determination of the instant case; and from (b) "directly or indirectly using, selling, encumbering, transferring, or otherwise disposing" of the stock of respondent which is held by petitioner (57a).

The procedural history of this case in the District Court leading up to the entry of these orders is important for a full understanding of petitioner's due process objections to the proceedings therein, as well as for the basis of the District Court's purported "Findings of Fact and Conclusions of Law."

Based upon the complaint filed on June 7, 1973, as well as on certain supporting affidavits, which likewise contained no charges against petitioner, respondent appeared before the District Court on or about June 7, 1973, without any prior notice to petitioner, and secured a temporary restraining order directed to petitioner which prohibited the "use," "disposition," "encumbrance," etc., of its primary asset, the stock of ICC.

On June 15, 1973, petitioner moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and insufficiency of process. This motion was denied, without prejudice, by the District Court, and after a preliminary appearance by petitioner on June 18, 1973, the Court, over petitioner's objection, also continued the temporary restraining order to an adjourned date on the order to show cause.

On June 22, 1973, respondent obtained an additional order to show cause, returnable June 27, 1973, why an order should not be issued preliminarily enjoining the further prosecution of a New Jersey state court action entitled *"Vesco & Co., Inc., v. Laurence B. Richardson, Jr., et al.,"* Docket No. C-3448-72, then pending in the Superior Court, Chancery Division, Bergen County.

Petitioner subsequently renewed its motion to dismiss the complaint on the grounds stated in its previous notice of motion of June 15, 1973, and additionally, for failure to state a claim upon which relief can be granted.

All of the foregoing matters came on for hearing before the District Court on June 27, 1973. Because of certain time pressures on the District Court, argument was not completed on June 22, 1973, and supplementary memoranda were invited by the Court, to be submitted no later than noon on Friday, June 29, 1973.

The Court expressed to counsel its intention that a decision would be rendered on Monday, July 2, 1973. Such memoranda were submitted by both counsel for petitioner and by counsel for respondent. David M. Butowsky, special counsel for respondent, ICC, proceeded to submit an additional memorandum to the Court on Monday, July 2, 1973.

As later appeared, although not made known to counsel for petitioner until Thursday, July 5, 1973, respondent apparently also submitted to the District Court on Monday, July 2, or Tuesday, July 3, 1973, "Proposed Findings of Fact and Conclusions of Law" (63a), as well as two proposed orders (47a and 59a).

No prior notice or consultation regarding these crucial "Findings," etc., was ever conducted with petitioner, and at no time did the District Court advise petitioner that it wished to have, or would even consider, such proposed findings, conclusions, or orders. While the proposals submitted by ICC were hand delivered to the District Court on July 3, 1973, counsel for petitioner received these documents by ordinary mail on July 5, 1973, after the orders had been signed and the proposed findings and conclusions adopted *in toto*.

On Thursday, July 5, 1973, counsel for petitioner learned that the District Court had signed, with substantially no change or alteration, and with no hearing or notice to this petitioner, or for that matter, to any of the other defendants, all of the documents submitted by respondent on Monday, July 2, 1973, and had apparently also incorporated the "Proposed Findings of Fact and Conclusions of Law" into the signed orders. Moreover, the Court apparently signed two varying sets of the same order (47a and 53a; 59a and 61a).*

These orders granted the preliminary injunctive relief described briefly above, and it was from these orders, after a futile effort before the District Court to have them set aside, that the appeal was taken to the United States Court of Appeals for the Second Circuit on August 1, 1973.

3. The Decision of the Court of Appeals

Upon the appeal, which was consolidated for the purposes of oral argument on December 10, 1973, with the appeals of three other defendants and one intervenor in the action, the United States Court of Appeals for the Second Circuit affirmed all portions of the orders of the District Court with the exception of that part which had enjoined the further prosecution of the New Jersey state court action entitled *"Vesco & Co., Inc. v. Laurence B. Richardson, Jr., et al."*

As to that segment of the order, the Court of Appeals modified and vacated so much of the preliminary injunction which had restrained Vesco & Co., Inc. from prosecuting the first three counts of its pending state court ac-

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* One of the orders was entered in the matter of *SEC v. Vesco, et al.*, 72 Civ. 5001, and refers to "defendant, Vesco & Co." This action, which has achieved considerable notoriety, was instituted in November, 1971, and Vesco & Co., Inc. was never a party thereto.

tion. The injunction remained in effect as to the fourth count.

The opinion of the Court of Appeals, which was filed on January 15, 1974 (1a), affirmed the District Court's actions regarding the acceptance and adoption of the purported "Findings of Fact and Conclusions of Law," although it commented at least twice on the "unsatisfactory method used by the district court in 'formulating' its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a)" (10a and 27a).

Petitioner seeks *certiorari* only from those portions of the decision of the Court of Appeals which affirmed the order of the District Court enjoining the disposition of the primary asset of petitioner, and which affirmed the District Court's denial of petitioner's motions to dismiss for lack of personal and subject matter jurisdiction, insufficiency of process, and failure to state a claim upon which relief can be granted, as well as the concomitant approval by the Court of Appeals of the District Court's adoption of the purported "findings" and the rejection of petitioner's due process contentions. Petitioner does not seek review of that portion of the decision of the Court of Appeals relating to the New Jersey lawsuit by Vesco & Co., Inc., except that, to the extent that the "Findings of Fact, etc.," were improperly adopted, petitioner contests these findings also.

REASONS FOR GRANTING WRIT

I.

The Court of Appeals, by not setting aside the District Court's "Findings of Fact and Conclusions of Law," has accepted and condoned a violation of petitioner's right to due process of law which calls for the exercise of this Court's power of supervision.

A. ***The proceedings in the District Court constituted a pattern of denial of procedural due process to petitioner, the approval of which by the Court of Appeals represents a departure from the accepted and usual course of judicial proceedings.***

Petitioner respectfully contends that commencing with respondent's initial application to the District Court for a temporary restraining order, a pattern developed which resulted in a continual denial to petitioner of the basic procedural due process rights which should be accorded to all litigants.

The scenario which unfolded, as described more fully below, and the subsequent failure to reverse on the basis of these events by the Court of Appeals, represented such a departure from the accepted and usual course of judicial proceedings, that petitioner respectfully contends that this Court should exercise its inherent power of supervision over the federal courts and reverse the decisions below.

Though perhaps unwittingly, the trial court was the instrument of these excesses—the upshot of which was to place petitioner in the untenable and unfair position of attacking determinations made on an essentially *ex parte* basis and (as appeared on the July 9, 1973 argument) on the basis of evidence gathered in another proceeding in which petitioner was not even a party.

The argument on June 27 ended with the District Court indicating that any further papers be filed with it by Friday, June 29—the clear implication being that it would thereafter rule, probably by July 2. Petitioner did file a letter-memorandum on June 29, which was hand-delivered to the Court and opposing counsel. Counsel for respondent responded by letter-memorandum, and, on July 2, special counsel for ICC responded. Counsel for petitioner received this last memorandum on July 3, and had no reason to believe anything other than that the District Court was now reviewing the matter.

What happened thereafter is partially speculation and partially reconstruction from the known circumstances. Unbeknownst to petitioner, counsel and special counsel for respondent apparently prepared on July 2 and *hand-delivered* to the District Court on July 3 lengthy proposed findings of fact and conclusions of law (63a), and forms of two orders (47a and 59a), and the District Court, also on July 3, signed the orders and adopted the findings and conclusions *verbatim*. Not only had the District Court failed to advise petitioner that it wished proposed findings, but it also had not even announced any decision to petitioner; and at the time it signed the order and adopted the proposed findings on July 3, petitioner did not even know of the existence of these documents!

Upon receiving informal advice on the morning of July 5* that some sort of order had been entered by the District Court, counsel for petitioner had the files of the District Court Clerk reviewed and there found the respondent's proposed findings and conclusions, together with a version of a signed order (47a), dated July 3, 1973, and indicating, as the basis therefor, the following:

* From respondent's counsel, by telephone.

> " • • • and upon the opinion of the Court dated , 1973 • • • ". (50a)

Counsel also discovered in the Court's file a second order—this one captioned in *SEC v Vesco, et al.*, 72 Civ. 5001 (CES), also dated July 3, 1973, enjoining the New Jersey action based upon " • • • the opinion of the Court dated July 3, 1973 • • • "—an "opinion" of which counsel was not aware and has not to this day seen (59a).

Subsequently, on July 5, 1973, counsel received the July 3 mailing from respondent's counsel of the *proposed* findings and conclusions and forms of orders; and thereafter received *two new sets of orders* (53a and 61a), identical to those on file in the Clerk's office, except that these orders, also dated July 3, 1973, instead of making reference to an undated "opinion" or a July 3 "opinion" of the Court, recited the following as the basis for the Order:

> " • • • upon the attached proposed findings of fact and conclusions of law dated July 2, 1973, adopted by the court and incorporated in this order • • • ". (56a and 62a)

Petitioner immediately sought a hearing before the District Court, and wrote to the Court setting forth its position. The District Court proceeded, at the argument held on July 9, to indicate, *inter alia*, that (a) it was unaware that petitioner had not seen the orders before entry; (b) in the absence of an evidentiary hearing (which neither respondent nor the Court had asked for) it had reached certain conclusions "on the basis of material which is before me, material which you didn't have an opportunity to deal with, at least not fully"; (c) the Court had "background which I can't ignore which I know about because of other Vesco cases and which I think I am entitled to take into account"; and (d) Vesco & Co., Inc.,

could have an evidentiary hearing if it wanted one but, now that the District Court had ruled, "there may be a shift in the burden."

It was precisely because of this statement by the Court regarding a shift in the burden, as well as the scenario which had developed up to that point, which prompted petitioner to question the usefulness of what could apparently be an after-the-fact evidentiary hearing. Contrary to the statement made by the Court of Appeals, however, Vesco & Co., Inc. did not decline the District Court's offer to respond regarding the purported "findings." A written specification of petitioner's objections was submitted to the Court on July 17, 1973—a communication to which a response was never made by the District Court.

Petitioner respectfully contends that the actions of the District Court constituted a continuing pattern of denial of basic procedural due process rights to petitioner. The facts belie the statement made by the Court of Appeals that petitioner was not prejudiced by the District Court's procedures.

Aside from a relatively benign admonition to the District Court regarding its adoption of the purported "findings," the Court of Appeals failed to confront and respond to the issues raised above. Where fundamental principles of due process of law have been violated to the extent witnessed herein, and where there has been such a consistent and substantial departure from the accepted and usual course of judicial proceedings, petitioner respectfully contends that it is the appropriate time for this Court to exercise its power of supervision and to strike down such practices and procedures.

B. ***Not only did the proceedings in the District Court constitute a denial of procedural due process to petitioner, but the purported "Findings of Fact and Conclusions of Law" were improperly issued, and were in any event clearly erroneous and should be set aside, based upon standards previously enunciated by this Court and other Courts of Appeals.***

As indicated above, the District Court purported to enter "Findings of Fact and Conclusions of Law" by adopting *verbatim* proposed findings and conclusions submitted on an *ex parte* basis by respondent's counsel and the special counsel for ICC appointed by the District Court, without any evidentiary hearing, and then refusing to vacate and set aside those findings and conclusions either in whole or, when presented with specific objections, even in part.

The approval by the Court of Appeals of the District Court's actions was clearly erroneous and should be reversed for the following reasons, in conformity with prior standards established by this Court and by other courts of appeals:

(i) Petitioner was denied an opportunity to be heard on the proposed findings and conclusions *before* entry;

(ii) The record is barren of evidential support for certain of the crucial findings and conclusions with respect to petitioner, and the District Court relied on other evidence outside the record.

The events leading up to and culminating in the District Court's *ex parte* adoption of respondent's proposed findings and conclusions has been recited above. The result of the District Court's actions was the incorporation of a highly slanted and unsupported narrative into its own order, not only without any prior notice to petitioner of its

determination, but with no opportunity whatsoever—as a practical matter—to submit counter-proposals or even to comment on the proposals made. Indeed, it would appear from the record that the Court adopted respondent's proposals on July 3 "hot off the press."

We are aware that the cases to date, while highly critical of the procedure whereby a trial court adopts *verbatim* the findings proposed by one of the parties, have not carried this criticism to the point of automatic reversal. See *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-85, 89 L. Ed. 160, 169, 65 S.Ct. 254 (1945); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 12 L. Ed.2d 12, 16-17, 84 S.Ct. 1044 (1964); *United States v. Forness*, 125 F.2d 928, 942-43 (2d Cir. 1942); and *Roberts v. Ross*, 344 F.2d 747, 751-52 (3d Cir. 1965).

On the other hand, in none of the cited cases was there, as here, a combination of circumstances including (a) an unannounced determination of the court (*i.e.*, communicated to one party and not the other), combined with (b) the *verbatim* adoption of findings and conclusions which were not only *not* shown to the losing party but whose existence was unknown to the losing party until after they were adopted. Petitioner respectfully contends that under such circumstances, the above cited cases do call for reversal.

One case which is quite analogous to the within action is *Chicopee Manufacturing Corp. v. Kendall Company*, 288 F.2d 719 (4th Cir. 1961), where findings and an opinion were prepared for the trial court by prevailing counsel, and adopted *in toto* without notice to other counsel. The Fourth Circuit reversed, condemning the practice as one which "involves the failure of the trial judge to perform his judicial function" (at p. 724-725). The Court

went on to note that when such a practice occurs without notice to the other side, it amounts to a denial of due process.

The purpose of the fact finding function prescribed by Fed. R. Civ. P. 52(a) is more than to establish a perfunctory "record" for review. As Judge Frank so eloquently spoke for the Second Circuit itself in *United States v. Forness, supra,* at pp. 942-43:

> "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous,' no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

The "mechanical" adoption of one counsel's proposed findings, in lieu of some original expression by the Court, not only deprives the parties of the basis for the Court's determination, but also may be "inadequate to support

his decision" and most likely "loaded down with argumentative over detailed partisan matter much of which is likely to be of doubtful validity or even wholly without support in the record," *Roberts v. Ross, supra,* at p. 752; also see, in particular, f.n. 4 to the majority opinion in *United States v. El Paso Natural Gas Co., supra,* 12 L. Ed. 2d at p. 17.

In the instant case, there is every indication from the record, and the facts and circumstances surrounding the presentation and execution, *ex parte,* of the two sets of orders, that not only were the adopted findings "not the products of the district judge's mind," *United States v. El Paso Natural Gas Co., supra,* 12 L. Ed. 2d at p. 17, but that they were not adopted with even the minimum standard of concern for factual and legal accuracy that would be expected from a disinterested and objective appraisal of the evidence and arguments of *both sides.*

It is one thing, and troublesome enough, for a Court to announce its decision and then adopt as its own the reasoning prepared by a zealous advocate, as in the cases, *supra;* it is quite another thing, as here, for *both the decision and the reasons* to be first announced through the writings of one counsel without even the knowledge, much less the participation, of the other. The fact that the participating counsel was appointed by the Court only heightens—rather than dispels—the overriding impression, expressed to the District Court, that the proceeding was more investigatory than judicial in nature.

The parameters of the concept of procedural due process are as flexible as the constitutional foundation on which it is erected. While it has conveniently and conventionally been deemed to include timely and adequate notice, the right to be heard in a full and meaningful manner, an impartial decisionmaker, and "a decision whose conclusions rest solely on evidence adduced at the hearing

and which states the reasons for the decisionmaker's determination and indicates the evidence upon which he relied," *Krause v. Schmidt*, 341 F. Supp. 1001, 1004 (D.C. W.D. Wis. 1972), citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed. 2d 287 (1970), each case must be measured on its own complex of circumstances.

In this case, the *ex parte* nature of the approaches to the District Court; the *ex parte* execution and adoption of orders, findings, and conclusions, including the partisan pronouncements and the blatant errors in the findings; the admitted reference to matters outside of the record in this case; the refusal to vacate the findings and start afresh—without any shift in burden—or even to correct obvious errors; all combine, petitioner respectfully submits, to so taint the decision-making process as to require complete reversal and remand for a fresh and independent consideration.

The findings and conclusions themselves, separate and apart from the manner in which they received the District Court's imprimatur, are seriously deficient in evidential support. All of petitioner's objections were outlined to the District Court at length in the July 17, 1973 letter referred to above.

In any event, however, the District Court's adoption of these purported "findings," and the sanction given to this act by the Court of Appeals, has circumvented and contravened the standards which have been established and consistently followed by both this Court and the various courts of appeals. For these reasons, it is now left to this Court to set aside these findings and conclusions, and to vacate the relief granted thereon.

II.

By affirming the District Court's denial of petitioner's motions to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of process, and failure to state a claim upon which relief can be granted, the Court of Appeals has placed itself in conflict with the decisions of other Courts of Appeals, as well as those of this Court.

A. *Aside from the purported "alter ego" finding and argument of the Court of Appeals, there was no independent basis for subject matter and personal jurisdiction, or for valid service of process over the petitioner, and accordingly, the complaint should have been dismissed.*

The complaint in the within action purports to assert federal jurisdiction based upon §27 of the Securities Exchange Act of 1934 (15 U.S.C.A. §78aa), as well as certain principles of pendent jurisdiction.

A reading of the complaint in this action, however, reveals that petitioner is mentioned only twice in the 27 pages—in the caption (99a) and in the description paragraph 5(r) (105a).*

Thus, it quickly becomes clear that the only possible basis of jurisdiction over petitioner in this case is to ascribe to Vesco & Co., Inc. the allegations asserted against defendant, Robert L. Vesco—the so-called *"alter ego"* theory

* Respondent filed an amended complaint with the District Court on September 7, 1973, while the appeal was pending. It is on the record as of the date on which this appeal was filed, however, that a decision must be rendered, and as outlined more fully below, that record is barren of any factual or legal basis for the District Court's rulings in this matter. The respondent's amended complaint can only be regarded as an effort to bolster its case on the appeal by attempting to alter the deficiencies in its position which appear on the record; and by a "bootstrap" technique at that, which is without evidential support in the record.

propounded by respondent in the proceedings below. The basis for such a finding, or lack thereof, will be considered more fully below. At this point, however, it is important to note that under the applicable standards in the decisional law of both this Court and the courts of appeals, there is no other independent basis on which to establish jurisdiction or legitimize service of process on this petitioner.

As noted above, there are no allegations in the complaint against Vesco & Co., Inc. itself regarding violation of the federal securities laws. Accordingly, the *alter ego* theory aside, there also can be no pendent claims asserted against petitioner which are within the jurisdiction of the District Court, for the law is well settled that "the doctrine of pendent jurisdiction may be invoked only where the claim based upon a substantial federal question is made against the same defendants with respect to whom non-federal claims are asserted." *Wojtas v. Village of Niles,* 334 F.2d 797 (7th Cir. 1964), *cert. den.,* 379 U.S. 964 (1965); *New Orleans Public Belt R.R. v. Wallace,* 173 F.2d 145 (5th Cir. 1949); *Lawes v. Nutter,* 292 F. Supp. 890 (S.D. Texas 1968); *Maher v. Newtown Creek Towing Company* 190 F. Supp. 933 (S.D.N.Y. 1961).

It is therefore absolutely clear that a defendant cannot be held subject to the jurisdiction of the court on the theory of pendent jurisdiction unless there is a substantial federal question or cause of action also asserted against it.

Thus, simply on the face of the complaint, the District Court lacked subject matter jurisdiction in this case. Furthermore, and again laying aside the *alter ego* issue, the complaint should have been dismissed because of the lack of personal jurisdiction and the insufficiency of process.

The Securities Act of 1934 (15 U.S.C. §78aa) in effect provides for service of process anywhere in the United

States. However, where a claim does not arise under the Securities Act (or any other federal act which specifically provides for special service of process) then Fed. R. Civ. P. 4(f) is the governing provision for where and how a summons and complaint in a federal action must be served.

This rule provides that "all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state."

In this case, petitioner was not served within the territorial limits of New York State, but rather in Delaware. There being no applicable federal statute providing for extra-territorial service, service of process was not properly effected and the District Court therefore did not have *in personam* jurisdiction over petitioner.

There is no theory of law that will support the sufficiency of process in this case, for it would still be insufficient, even considering any state long-arm statute. The requirements of due process have not been met in this instance.

In order for the corporation to be amenable to service in a state, it must have minimal contacts with the state, sufficient to warrant subjecting it to suit here without offending due process standards. *McGee v. International Life Insurance*, 355 U.S. 220 (1957); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

More than an incidental contact with the state is necessary, although the party does not have to be authorized to do business in the state or have offices there. In this case, petitioner fits none of the requirements necessary to sustain the District Court's jurisdiction. It has

absolutely no contact whatsoever with New York State. It transacts no business in New York State and has no agents functioning in New York State. It is incorporated in the State of Delaware with an office in the State of New Jersey. To subject it to jurisdiction before the District Court goes beyond any sense of fair play, due process, or substantial justice as enunciated by the courts.

Thus, viewing solely the allegations which have been asserted against this petitioner and not against any other defendant, the complaint must be dismissed because of the complete lack of any jurisdictional basis over Vesco & Co., Inc.

B. ***The Court of Appeals erred in upholding the finding of the District Court that petitioner was the alter ego of defendant, Robert L. Vesco, and no other claims have been asserted against petitioner.***

Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint should be dismissed if there is a "failure to state a claim upon which relief can be granted." As indicated above, there have been no claims asserted specifically against petitioner. Rather, respondent has relied upon a blanket conclusionary contention, *not* contained in the complaint, that petitioner is in some way associated with defendant, Robert L. Vesco, and that this is sufficient for jurisdiction, even in the absence of traditional legal principles.

The only basis for finding a claim asserted against petitioner is on the basis of the *alter ego* finding of the District Court, which was relied upon by the Court of Appeals.

By affirming this finding, however, even in the preliminary context and without an evidential hearing, the Court of Appeals has contravened the principles established by other courts of appeals for the circumstances under which a corporate veil will be pierced. *Zubik v. Zubik*, 384 F.2d

267 (3d Cir. 1967); *Plumbers & Fitters, Local 761 v. Matt J. Zaich Construction Co.*, 418 F.2d 1054 (9th Cir. 1969).

In *Zubik*, the Court refused to pierce the corporate veil of a family-held corporation which had been formed in part for tax purposes, and issued the following admonition:

> "In applying the test, however, any court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception . . . Care should be taken on all occasions to avoid making the entire theory of the corporate entity . . . useless . . .
>
> Limiting one's personal liability is a traditional reason for a corporation. Unless done deliberately, with specific intent to escape liability for a specific tort or class of torts, the cause of justice does not require disregarding the corporate entity." (384 F.2d at p. 273.)

A similar warning that the power of courts to disregard corporate entities should only be used in exceptional circumstances was contained in *In re Penn Central Securities Litigation*, 335 F. Supp. 1026, 1035 (E.D. Pa. 1971). The Court held that "fraud, illegality, injustice, or the defeat of public policy" must be established before a corporate existence should be ignored, and it refused to so act in that case, stating that,

> "Even ownership of all the stock of a corporation coupled with a common management does not operate as a merger of the two corporations into a single entity."

In the *Plumbers & Fitters* case, the Court also refused to pierce the corporate veil where plaintiff showed only that the corporation in question had been formed solely for tax purposes. The Court refused to act where no showing was made that any wrongdoing had occurred. The admitted close relationship between the two compan-

ies was not deemed sufficient to take the extraordinary step of disregarding a corporate existence.

These cases are directly analogous to the situation presented herein, and under the standards imposed by the courts in these cases, if the foregoing factors amount to a corporate *alter ego* sufficient to disregard the corporate entity, then the existing case law on the subject is remarkably out of date. Absent a showing of fraud or fraudulent conduct in the formation or use of the entity, nothing alleged against Robert Vesco or any other defendant in this case can properly be attributed to petitioner; and surely not by the interposition, as the trial judge apparently did, of matters presented to him in another proceeding in which petitioner was never a party.

Thus, petitioner respectfully contends that the Court of Appeals failed to apply the proper standard in affirming the District Court's finding that petitioner was the *alter ego* of defendant, Robert L. Vesco. Furthermore, if this Court holds that the Court of Appeals did err in this regard, the complaint must then be dismissed, for there are no other independent claims against petitioner which could conceivably satisfy the requirements of Fed. R. Civ. P. 12(b)(6).

III.

The Court of Appeals affirmed the preliminary injunction against the disposition of petitioner's primary asset, although respondent did not meet its burden of proof and establish the need for preliminary injunctive relief, as necessitated by the applicable standards of the case law.

Two crucial factors must be considered by the Court in examining what support existed on the record for the granting of the preliminary injunction: (a) the scope and

quality of the evidential record; and (b) the success or failure of the party seeking the relief (respondent herein) in meeting the burden of proof in that regard.

Respondent has not only failed to plead or allege any specific facts regarding the supposed lack of independent existence of Vesco & Co., Inc., or its consequent responsibility for the obligations of defendant, Robert L. Vesco, but it has also failed to come forward with anything other than conclusionary assertions based on the "information and belief" of the special counsel for respondent.

It is clearly established that on an application for preliminary injunction, the burden is on the plaintiff to establish the right to such relief. *United States v. Gilman*, 341 F. Supp. 891 (S.D.N.Y. 1972); *Dopp v. Franklin National Bank*, 461 F.2d 873 (2d Cir. 1972).

Injunctions may not be granted simply because they may be useful or helpful to the plaintiff in the prosecution of a particular action. Furthermore, respondent cannot succeed in meeting its burden by mere assertions of irreparable injury, for as the court stated in *Hershey Creamery Co. v. Hershey Chocolate Corp.*, 269 F. Supp. 45 (S.D. N.Y. 1967);

> "The plaintiff must make out a case for the issuance of the injunction by demonstrating that there is a clear present need for it. Injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties."

All of the cases relied on by the Court of Appeals granted injunctive relief only after extensive factual testimony or presentations had been made, and in no instance was relief granted on a record as flimsy and barren of evidential support as presented herein.

It is particularly interesting to note that at no time has respondent asserted any allegations against petitioner that Vesco & Co., Inc. itself has in any way utilized its ownership of ICC stock to perpetrate or perpetuate any fraud.

In sanctioning the granting by the District Court of the preliminary injunction against the disposition of the primary asset of petitioner, the Court of Appeals has failed to follow the accepted standards relating to the burden of proof in the granting of such relief.

CONCLUSION

Petitioner respectfully submits that this case presents the overriding issue of whether all litigants will be treated equally before the courts of this land, regardless of their alleged notoriety, and without regard to extraneous or extra-judicial considerations, which, petitioner respectfully contends, is precisely what did not occur in the case at bar.

For all of the foregoing reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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On the Brief

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 462, 463, 539—SEPTEMBER TERM, 1973

(ARGUED DECEMBER 10, 1973 DECIDED JANUARY 15, 1974)

DOCKET NOS. 73-2202
73-2255
73-2568

INTERNATIONAL CONTROLS CORP.,
Plaintiff-Appellee,

vs.

ROBERT L. VESCO, et al.,
Defendants,

and

FAIRFIELD GENERAL CORPORATION, FAIRFIELD AVIATION CORPORATION, and SKYWAYS LEASING CORPORATION,
Defendants-Appellants.

INTERNATIONAL CONTROLS CORP.,
Plaintiff-Appellee,

vs.

ROBERT L. VESCO, et al.,
Defendants,

and

VESCO & CO., INC.,
Defendant-Appellant.

INTERNATIONAL CONTROLS CORP.,
Plaintiff-Appellee,

vs.

ROBERT L. VESCO, et al.,
Defendants,

and

ANDEAN CREDIT, S.A.,
Intervenor-Appellant.

Before:

Kaufman, Chief Judge,
Mansfield and Mulligan, Circuit Judges.

Appeal from three orders of preliminary injunction entered in the United States District Court for the Southern District of New York, Charles E. Stewart, Judge, enjoining the disposition of various assets and the prosecution of pending state court actions pendente lite.

Affirmed as modified as to Fairfield General Corp., Fairfield Aviation Corp., and Skyways Leasing Corp.

Affirmed as modified as to Vesco & Co., Inc.

Affirmed and remanded for reconsideration of whether ICC must post security as to Andean Credit, S.A.

A. Dennis Terrell and Matt Farley, Newark, New Jersey (J. William Barba, Shanley & Fisher, Newark, New Jersey on the brief), for Appellants Fairfield General Corp., Fairfield Aviation Corp., and Skyways Leasing Corp.

Laurence B. Orloff, Newark, New Jersey (Gary S. Freedman, Hannoch, Weisman, Stern & Besser, Newark, New Jersey; Arum, Friedman & Katz, New York, New York on the brief), for Appellant Vesco & Co., Inc.

Arthur H. Christy, New York, New York (Robert S. Appel, David P. Steinmann, Christy, Frey & Christy, New York, New York on the brief), for Intervenor-Appellant Andean Credit S. A.

Milton S. Gould, C. Leonard Gordon, and Sheldon D. Camhy, New York, New York (Daniel L. Carroll, Shea Gould Climenko & Kramer, David M. Butowsky, New York, New York on the brief), for Appellee.

The Securities and Exchange Commission, Washington, D.C. (David Ferber, Solicitor, Robert E. Kushner, Assistant General Counsel, Alan J. Blank, Special Counsel, and David K. Ginn, Attorney), as Amicus Curiae.

Kaufman, Chief Judge:

A mere glimpse into the multifarious financial manipulations of Robert Vesco reveals a web of corporate and personal transactions of astonishing intricacy. Although the appellants before us do not include Mr. Vesco, himself, who we note parenthetically has refused to return to the Southern District of New York[1] and seems to be safely ensconced in the Bahamian island of Nassau beyond the

1. Three indictments are currently outstanding in the Southern District of New York in which Robert L. Vesco is named as a defendant. *United States v. Vesco*, 73 Crim. 707 (indictment filed July 20, 1973, charging wire fraud); *United States v. Vesco*, 73 Crim. 518 (indictment filed June 1, 1973, charging wire fraud); *United States v. Mitchell, et al.*, 73 Crim. 439 (indictment filed May 10, 1973, charging Vesco with conspiracy and related substantive counts of obstructing justice, and conspiracy to defraud the United States in relation to the lawful functions of the SEC and the GAO).

reach of the United States,[2] we cannot ignore his pervasive presence in the litigation which precipitated these appeals. Having allegedly utilized appellee International Controls Corp. [ICC] as a financial source and vehicle for his purported securities manipulations, Vesco, and his individual and corporate associates, have now become the objects of ICC's strenuous efforts to recover whatever assets remain —assets ranging from, (1) a Boeing 707 aircraft, owned by appellant Skyways Leasing Corp., a wholly owned subsidiary of appellant Fairfield Aviation Corp., in turn wholly-owned by appellant Fairfield General Corp. [Fairfield Group], to (2), 846,380 shares of ICC common stock transferred by Vesco and his children to appellant Vesco & Co., Inc. [Vesco & Co.], to (3), a pleasure yacht, the Patricia III, which, although used exclusively by Vesco and his family, is claimed by intervenor-appellant Andean Credit, S.A. [Andean]. Thus, we are asked by appellants Fairfield Group, Vesco & Co. and Andean, in three separate appeals, to review the propriety of preliminary injunctions issued by Judge Stewart restraining the disposition of these various assets claimed by ICC, injunctions which, with some modification, we affirm.

I. Introduction

On November 27, 1972, the Securities and Exchange Commission [SEC] filed a complaint in the Southern District of New York, SEC v. Vesco et al., 72 Civ. 5001, against 42 individual and corporate defendants[3] alleging a scheme

2. New York Times, December 8, 1973, at 1, Col. 1. This report may be outdated, however, for it is rumored that Vesco has recently departed the Bahamas for Costa Rica. 7 New York Magazine, December 31, 1973/January 7, 1974, at 5.

3. Robert L. Vesco, Norman LeBlanc, Milton F. Meissner, Ulrich J. Strickler, Stanley Graze, Frank G. Beatty, Richard E. Clay, Wilbert J. Snipes, James Roosevelt, Frederick J. Weymar, Gilbert R. J. Straub, C. Henry Buhl III, Allan C. Butler, Laurence B. Richardson, John D. Schuyler, Edward Stoltenberg, Howard F. Cerny, Georges Phillipe, Allan F. Conwill, Raymond W.

of extraordinary magnitude, deviousness, and ingenuity in violation primarily of the anti-fraud provision of the Securities and Exchange Act of 1934 [1934 Act], Section 10(b) (15 U.S.C. §78j[b]), and Rule 10b-5 (17 CFR §240.10b-5). In brief, the SEC charged that Robert Vesco masterminded and, with his cohorts, implemented a plan involving the manipulations of the assets and securities of a number of corporations controlled by Vesco including ICC, also a defendant in this SEC suit. In the course of this purported scheme, Vesco and his group were alleged to have defrauded the public investors in ICC, as well as investors in four mutual funds, managed by subsidiaries of IOS, Ltd., a corporation which had been acquired by ICC, through the creation of a number of corporate entities and the subsequent transfer of these corporations of the assets of ICC and the mutual funds. The SEC asserted that as a result of this elaborate shell game, clothed in the garb of securities transactions, Vesco and others had secured control of over $200 million deposited in banks located in countries ranging geographically from Luxembourg to Costa Rica. The complaint closed with a prayer for permanent injunctive relief against future violations and a demand that receivers be appointed for several defendant corporate vehicles, including ICC.

On March 16, 1973, ICC, without admitting or denying the allegations in the Commission's complaint, consented to the entry of final judgment against it in the SEC ac-

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Merritt, John S. D'Alimonte, IOS Ltd., International Controls Corp., Bahamas Commonwealth Bank, Ltd., Overseas Development Bank Luxembourg S.A., International Bancorp Ltd., Value Capital Ltd., Butlers Bank Ltd., Transglobal Financial Services Ltd., Kilmorey Investments Ltd., Global Holdings Ltd., Global Financial Ltd., I.I.T. Management Co., S.A., F.O.F. Management Co., Ltd., Venture Management Co., Ltd., Transglobal Growth Fund Management Co., Ltd., Bank Cantrade, Ltd., Venture Fund (International), N.V., Fund of Funds, Ltd., Transglobal Growth Fund Ltd., IIT, an International Investment Trust, and Consulentia Verwaltungs, A.G.

tion.[4] Pursuant to this consent judgment, ICC was permanently enjoined from future violations of the Securities Exchange Act. Judge Stewart further ordered that, in lieu of the appointment of a receiver sought by the SEC, a Special Counsel and a new interim board of directors be appointed by the Court to represent ICC. The order provided that

> Special Counsel shall have the power and be directed to (inter alia):
>
> . . . .
>
> (b) take all appropriate action, including but not limited to, the institution and prosecution of suits on behalf of International Controls to recover all assets or monies improperly used, taken, wasted, misappropriated, dispensed, obligated or paid to anyone (i) without appropriate authorization, approval or ratification of the board of directors of International Controls or (ii) in breach duties owed to defendant International Controls or its subsidiaries by present or former officers, directors or employees of International Controls or any other person. The Special Counsel shall consult with plaintiff Commission and the board of directors of International Controls in the resolution of all claims International Controls may have. He shall neither decline to pursue any claim . . . nor

4. The SEC has secured preliminary injunctive relief, following a lengthy evidentiary hearing, against Vesco and 12 individual and corporate defendants, Meissner, Strickler, Graze, Weymar, Straub, IOS Ltd., Transglobal Financial Services, Ltd., Kilmorey Investments Ltd., I.I.T. Management Co., S.A., F.O.F. Management Co., Ltd., Venture Management Co., Ltd., and Transglobal Growth Fund Management Co., Ltd. The SEC has also secured default judgments against LeBlanc, Bahamas Commonwealth Bank, Ltd., Overseas Development Bank Luxembourg, S.A., International Bancorp., Ltd., Value Capital, Ltd., Global Holdings, Ltd., and Global Financial, Ltd. Judge Stewart denied the SEC's request for a preliminary injunction against Beatty, Clay, Snipes, Schuyler and Stoltenberg. No preliminary relief, aside from the appointment of a temporary receiver for certain corporate defendants, was sought against the remaining defendants

settle any claims against the recommendation of plaintiff Commission and without the approval of this Court;

. . . .

(d) pending the investigation and accounting by the Special Counsel, he shall take immediate, necessary or appropriate action to protect International Controls' claims, interests and rights and pursue all possible claims against the defendants herein or any other persons including, but not limited to, the commencement of legal proceedings to prevent the dissipation or flight of any funds or other assets, the placing of a stop transfer order on securities beneficially owned or controlled by said defendants and/or the institution of appropriate action to freeze and preserve the assets of said defendants or others who may be obligated to International Controls . . .

The order also provided that the newly-appointed board of directors "shall replace the existing board of directors of International Controls, and shall have full power under applicable corporate law to conduct the affairs of International Controls in conjunction with the Special Counsel . . ."

Given this mandate, Special Counsel David Butowsky, on June 7, 1973, filed a complaint on behalf of ICC against 32 individual and corporate defendants,[5] 22 of whom were defendants in the pending SEC action, and 10 of whom,

5. Robert L. Vesco, Harry L. Sears, Frank G. Beatty, Norman LeBlanc, Stanley Graze, Milton F. Meissner, Ulrich J. Strickler, Richard E. Clay, Wilbert J. Snipes, Frederick J. Weymar, Gilbert R. J. Straub, C. Henry Buhl III, Ralph P. Dodd, Alwyn Eisenhauer, Georges Phillipe, Joel Grady, Shirley Bailey, Vesco & Co., Inc., IOS Ltd., Bahamas Commonwealth Bank, International Bancorp Ltd., Kilmorey Investments Ltd., Value Capital Ltd., Global Holdings Ltd., Global Financial Ltd., Butlers Bank, Ltd. (now known as Who Holdings Ltd.), Allan J. Butler, Bank Cantrade Ltd., Fairfield Aviation Corporation, Fairfield General Corporation, Skyways Leasing Corporation and Marine Midland Bank.

including Vesco & Co. and the Fairfield Group were not. The complaint contained eleven "counts" alleging various violations of the 1934 Act, principally of Section 10(b) and Rule 10b-5, and charged fraud, self-dealing, waste of corporate assets and breach of fiduciary duty. Much of the complaint paralleled the SEC's charges of securities manipulation by Vesco and his associates at the expense of ICC and its stockholders. The Fairfield Group, the ICC complaint alleged, had been the vehicle for the diversion of ICC's assets in the form of a Boeing 707 aircraft, purchased and leased to ICC by Skyways at a time when Skyways was a wholly-owned subsidiary to ICC. ICC charged also that Vesco had caused ICC to spend over $1 million in refurbishing the plane, including the installation of a discotheque and sauna for Vesco's private use, and that Vesco and certain other directors of ICC had fraudently induced the remaining ICC directors to approve a dividend in kind of ICC's stock in the Fairfield Group, thereby establishing the Fairfield Group as corporate entities independent of ICC. Appellant Vesco & Co. was referred to in the complaint only once and quite simply as "a Delaware corporation to which defendant Vesco and his children have transferred certain of their assets."

Since Robert L. Vesco, the principal orchestrator of the alleged fraud, had already fled the United States and resisted efforts to induce him to return, ICC moved quickly to prevent the dissipation of assets to which it would be entitled if its lawsuit should be successful. Accordingly, ICC first obtained temporary restraining orders and, then on July 3, 1973, secured preliminary injunctions against Vesco & Co. and the Fairfield Group. Vesco & Co. was enjoined from disposing of the 846,830 shares of ICC common stock and from prosecuting a pending state court derivative suit instituted by Vesco & Co. on behalf of ICC

against certain former and current directors of ICC. The Fairfield Group was similarly enjoined from selling the Boeing 707 and from prosecuting two actions against ICC, filed in New Jersey Superior Court, for failure to continue payments under the Boeing 707 lease between ICC and Skyways, and to recover books and records of the Fairfield Group in the possession of ICC. Finally, after ICC had secured a temporary restraining order against Vesco restraining the removal from its Miami berth of the yacht, Patricia III, used and allegedly owned by Vesco, the appellant in the third appeal before us, Andean Credit, intervened, claiming ownership of the yacht and seeking, therefore, to have the temporary restraining order dissolved. After an evidentiary hearing before Judge Stewart, the temporary restraining order ripened into a preliminary injunction, issued October 5, 1973, restraining Andean from removing the yacht from its berth.

Having sketched the broad outlines of the litigation resulting from Vesco's extraordinary complex manipulations, and which spawned the three appeals before us, we can now turn to the specific claims asserted by each appellant. Although of common origin, each appeal rests on factual and legal contentions sufficiently different to warrant separate discussion.

II. The Fairfield Group Appeal

The factual basis for the preliminary injunction issued against the Fairfield Group is not disputed. Thus, Judge Stewart did not find it necessary to hold an evidentiary hearing as a predicate to granting injunctive relief. See SEC v. Frank, 388 F.2d 486 (2d Cir. 1968). On its part, ICC filed four affidavits in support of its motion: (1) by David Butowsky, Special Counsel; (2) by Allen Shinn, a court-appointed director and President of ICC; (3) by

Laurence B. Richardson, Jr., former President, Chief Operating Officer and director of ICC; (4) by Malcolm McAlpin, a former director of ICC. In response, the Fairfield Group submitted an affidavit by Joel M. Grady, President of Skyways and Fairfield Aviation, Executive Vice President of Fairfield General, and a director of all three corporations.

Our examination[6] of these affidavits reveals the following salient facts. On June 15, 1971, Skyways, then a wholly-owned subsidiary of Fairfield Aviation, which, in turn, was a wholly-owned subsidiary of ICC, purchased a Boeing 707 jet aircraft from Pan American World Airways, Inc. for $1,375,000. Thereafter, on October 1, 1971, Skyways leased the plane to ICC for a five-year period for an approximate gross rental of $3,500.000. This lease also provided that, upon five days notice, Skyways could terminate the lease should it desire to sell the aircraft and that all improvements to the aircraft would remain the property of Skyways. This lease was not submitted to the board of directors of ICC for approval until December 8, 1971.

During the six-month period from June to December 1971, ICC spent $600,000-$700,000 to refurbish the plane. These improvements, however, were not of the sort generally associated with business purposes but rather, suited the personal comforts, conveniences and zest for living of the primary user of the 707, Vesco.

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6. Ordinarily, we would give considerable weight to the detailed findings of fact of a district judge supporting his order granting the preliminary injunction. But, we must note our disapproval of the procedure utilized by Judge Stewart, roundly condemned in this as well as other circuits, of adopting in toto the findings of fact submitted by counsel for ICC. See e.g. Rooted Hair, Inc. v. Ideal Toy Corp., 329 F.2d 761 (2d Cir.), cert. denied, 379 U.S. 831 (1964) (Medina, J. concurring). Since, however, no evidentiary hearing was required in this instance, we are in as good a position as the district judge to evaluate the facts, Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1972), and need not, therefore, depend too heavily on his findings.

On November 19, 1971, ICC incorporated Fairfield General as a wholly-owned subsidiary. Subsequently, on December 8, 1971, at a board of directors meeting crucial to the alleged fraud, the ICC board first approved the transfer of ICC's Fairfield Aviation stock to Fairfield General, in return for additional stock in Fairfield General and second, voted to issue all of the Fairfield General stock to the shareholders of ICC as a dividend in kind. Both Richardson and McAlpin, members of the board of directors on December 8, stated in their affidavits that, at the time of this meeting, they had not been informed either of the improvement expenditures or of the termination and ownership of improvements provisions of the Boeing 707 lease and, had they known of these facts, they would not have approved the dividend of the Fairfield General stock.

Based on the foregoing facts, ICC claims in its complaint that it was fraudulently deprived of the Boeing 707 aircraft since, as a result of the spin-off of Fairfield General and its wholly-owned subsidiaries, Fairfield Aviation and Skyways, that asset is no longer under its control. Moreover, in exacerbation of this loss, ICC contends that it remains obligated to Skyways under the onerous 707 lease. ICC claims that the motive for the spinoff was Vesco's concern that he might lose control over ICC and, as a consequence, be forced to relinquish his personal use of the 707. Accordingly, to foreclose that eventuality, Vesco sought to shelter the aircraft in a corporate shell free from ICC's control, a corporation such as Fairfield General in which all of the directors were Vesco associates.[7] ICC concludes its complaint by praying, inter alia, that the fraudulently induced dividend of Fairfield General stock be declared null and void.

The Fairfield Group responded by filing a motion to dismiss the complaint, asserting a lack of subject matter

7. At the time of the spin-off, the directors of Fairfield General were Vesco and defendants Beatty, Dodd, and Clay.

jurisdiction under the 1934 Act. They urged that while ICC may have stated a claim of internal corporate mismanagement, it had not stated or proved a claim cognizable under Section 10(b), the only section of the 1934 Act relied on by ICC, and Rule 10b-5 thereunder. Absent subject matter jurisdiction under the 1934 Act, moreover, the Fairfield Group contended that the suit must be dismissed as to them because, as New Jersey corporations doing no business in New York, service of process could only be valid under the provision for nationwide service of process, 15 U.S.C. §78aa, if the 1934 Act were applicable.

A. Subject Matter Jurisdiction Under Section 10(b)

Section 10 of the 1934 Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Commission provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

It is now well-settled that the failure or refusal of a majority of a board of directors to disclose to the remaining directors pertinent information, as Richardson and McAlpin claimed was the case concerning the dividend of Fairfield General stock, constitutes a "fraud" upon ICC within the meaning of section 10(b) and Rule 10b-5. Ruckle v. Roto American Corp., 339 F.2d 24 (2d Cir. 1964). The critical question remains, however, whether that "fraud" was perpetrated on ICC "in connection with the purchase or sale of any security." Haberman v. Murchison, 468 F.2d 1305 (2d Cir. 1972); Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1962).

ICC contends that its exchange of Fairfield Aviation stock for Fairfield General Stock constituted the requisite "sale." Although the definition of "sale" under the 1934 Act is indeed a broad one—including "any contract to sell or otherwise dispose of" (15 U.S.C. §78c[14])—we cannot agree that by transferring its ownership of Fairfield Aviation to its wholly-owned subsidiary, Fairfield General, ICC in any sense "disposed of" its Fairfield

Aviation stock. Quite simply, as long as ICC retained sole ownership of Fairfield General, it retained complete control over Fairfield Aviation and, thus relinquished nothing in the exchange. Accordingly, that self-dealing transaction does not appear to satisfy the "purchase or sale" requirement of §10(b) and Rule 10b-5. Cf. Blau v. Mission Corp., 212 F.2d 77, 80 (2d Cir.), cert. denied, 347 U.S. 1016 (1954);[8] In re Penn Central Securities Litigation, 347 F. Supp. 1327, 1333-1339 (E.D. Pa. 1972).

ICC also suggests that its dividend in kind of the Fairfield General stock represented a "sale" under the relevant statute and rule. It urges us to follow a recent line of cases holding that such subsidiary spin-offs constitute "sales" for purposes of the Securities Act of 1933 [1933 Act], 15 U.S.C. §77a et seq., thus requiring a registration statement to be filed covering the subsidiary's shares, as in fact Fairfield General did file in this instance.[9] SEC v. Datronics Engineers, Inc., [Current Volume] CCH Fed. Sec. (4th Cir. 1973), petition for cert. filed, 42 U.S.L.W. L. Rep. ¶94,334 (4th Cir. 1973) 3388(U.S. Dec. 27, 1973)

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8. In Blau, a similar conclusion was reached in the context of §16(b) of the 1934 Act. Nevertheless, we should note that having elevated the functional interpretation of the terms "purchase" and "sale" to the sine qua non of §16(b) analysis, see e.g. Abrams v. Occidental Petroleum Corp., 450 F.2d 157, 162 (2d Cir. 1971), aff'd sub nom. Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973), we surely would be remiss were we to discard this functional approach in the milieu of §10(b). Accordingly, as we discuss further *infra*, we do not consider the interpretation of the terms "purchase" and "sale" as used in §16(b) to be dispositive of their meaning in the context of §10(b).

9. Shinn's affidavit states that the prospectus filed by Fairfield General contained numerous misstatements of fact. Although the existence of such misstatements, if proven, may demonstrate the fraudulent purposes of the Fairfield Group and its defendant directors, we cannot see the relevance of these alleged misrepresentations to ICC's claim under §10(b). To be sure, one who relied on this prospectus in the purchase or sale of Fairfield General stock might well assert a §10(b) claim against the issuer, Fairfield General or, perhaps, ICC as an "underwriter." But, ICC does not contend that any of its directors were misled by this prospectus in determining whether to approve the spin-off dividend, the transaction asserted to be the requisite §10(b) "sale." Accordingly, we do not believe it necessary to decribe and analyze these alleged misrepresentations.

(No. 1011); SEC v. Stern-Haskell Inc., [Current Volume] CCH Fed. Sec. L. Rep. ¶94,065 (S.D.N.Y. 1973); SEC v. Harwyn Industries Corp., 326 F. Supp. 943 (S.D.N.Y. 1971). Although each of these cases involved the 1933 Act definition of "sale," a definition which explicitly requires that the "disposition" be "for value,"[10] each cited case rested on facts wholly inapposite to the instant one. In each instance, the court held that the parent corporation had received "value" or consideration for the "disposition" of its subsidiary through the creation of a public market in the subsidiary's shares, an "after-market" which substantially increased the value of the spun-off subsidiary's shares retained by the parent corporation or by the insiders in control of the parent. In contrast, the thrust of ICC's complaint is that it was fraudulently induced to part with its subsidiary, bearing with it a very valuable asset in the form of a Boeing 707 aircraft, without receiving any value whatsoever.[11] In short, we do not believe that ICC can find comfort in the Harwyn line of cases for the proposition that its spin-off of Fairfield General constituted a "sale" under §10(b) and Rule 10b-5.

Finding the analogy to Harwyn and its progeny inapt, we searched, but in vain, for a precedential response to the precise question whether a dividend of portfolio securities might satisfy the "purchase or sale" requirement of §10(b) and Rule 10b-5. Our attention, of course, was directed to the seminal case construing "purchase" and "sale" in the context of §16 (b) of the 1934 Act, Shaw

10. Section 2(3) of the 1933 Act, 15 U.S.C. §77b(3), defines a "sale" as "every contract or disposition of a security or interest in a security, for value."

11. The SEC, as amicus, has proffered the argument that ICC received consideration for its Fairfield General spin-off in the form of the five-year lease of the plane with Skyways. Although it is true that both the lease and the spin-off were formally ratified by the board of directors on December 8, 1971, it is also the case that ICC had entered into the lease agreement and had begun paying rent on October 1, 1971. Accordingly, it is highly unlikely that ICC was induced to spin-off Fairfield General by the lure of a lease to which Skyways was firmly and, we might add, happily committed.

v. Dreyfus, 172 F.2d 140 (2d Cir.), cert. denied, 337 U.S. 907 (1949). In Shaw, a dividend panel of this Court held that the receipt of stock rights, essentially analogous to a stock dividend because issued on a pro rata basis to all shareholders, did not constitute a "purchase" of those rights by the stockholders. Although apprised of the broad definitional language of "purchase"[12] and "sale"[13] under the 1934 Act, we declined to interpret the term "purchase" to include any "acquisition" or the term "sale" to include any "disposition." Instead, over the sharp dissent of Judge Clark, the majority stated that a "purchase" or "sale" meant an acquisition or disposition for consideration. Thus, Shaw held that since the shareholder recipients of the stock rights had not given the corporation any quid pro quo in return for these rights, their acquisition was not a "purchase," and there was no liability under §16(b) for any profit on their subsequent, short-swing sale.

The Fairfield Group strenuously argues that our decision in Shaw governs the instant case. They contend that the ICC dividend in kind of the Fairfield General securities is identical with the rights distribution in Shaw because both were distributed on a pro rata basis to all stockholders and neither required any payment by the recipient shareholders in return. Without in any way questioning the soundness of our decision in Shaw, we do not find it determinative, for we are mindful of the following words of caution uttered in a remarkable similar context by the Supreme Court:

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12. Section 3(a)(13) of the 1934 Act, 15 U.S.C. §78c(a)(13), defines "purchase" as follows:
The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.

13. Section 3(a)(14) of the 1934 Act, 15 U.S.C. §78c(a)(14), defines "sale" as follows:
The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of.

> Although the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen, ordinary rules of statutory construction still apply. The meaning of particular phrases must be determined in context, SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350-351 (1943). Congress itself has cautioned that the same words may take on a different coloration in different sections of the securities laws; both the 1933 and the 1934 Acts preface their lists of general definitions with the phrase "unless the context otherwise requires." 1933 Act, §2, 48 Stat. 74, 15 U.S.C. §77b; 1934 Act, §3, 48 Stat. 882, 15 U.S.C. §78c. We must therefore address ourselves to the meaning of the words "purchase or sale" in the context of §10(b). Whatever these similar words may mean in the numerous other contexts in which they appear in the securities laws, only this one narrow question is presented here.

SEC v. National Securities, Inc., 393 U.S. 453, 466 (1969).

We must, therefore, in accordance with the teaching of National Securities, consider whether the fraudulent conduct alleged, in this case the withholding of information pertinent to the issuance of a portfolio security dividend, "is the type of fraudulent behavior which was meant to be forbidden by the statute and the rule." Id. at 467. In seeking to effectuate the purpose of §10(b), we recognize that it "must be read flexibly, not technically and restrictively." Supt. of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971). Moreover, the Court, in Bankers Life, emphasized that §10(b) was intended by Congress to protect investors, including corporations, from deceptive devices and contrivances which would inhibit informed decision-making in the course of securities transactions. And, the

Court quoted with approval the following language from Shell v. Hensley, 430 F.2d 819, 827 (5th Cir. 1970):

> When a person who is dealing with a corporation in a securities transaction denies the corporation's directors access to material information known to him, the corporation is disabled from availing itself of an informed judgment on the part of its board regarding the merits of the transaction. In this situation the private right of action recognized under Rule 10b-5 is available as a remedy for the corporate disability.

Supt. of Insurance v. Bankers Life & Cas. Co., supra, 404 U.S. at 13.

In light of this umbrella of protection placed over securities transactions by §10(b), we are of the view that ICC must be deemed to be a "seller" of its Fairfield General stock at the time it disposed of its Fairfield General portfolio securities by way of a dividend in kind to its shareholders. The decision whether to retain or spin-off a subsidiary is indeed an important one for the parent corporation. The possible asset drain must be weighed against such considerations as the desirability of removing the blight of an unprofitable subsidiary from the consolidated income statistics reported to the public. In any event, it is a transaction involving, as it unquestionably does, the disposition of securities and, therefore, one for which the corporation is well deserving of and entitled to the protection of §10(b).

Nor do we believe, as our dissenting brother suggests, that because ICC's shareholders were not required to part with consideration in return for the dividend of Fairfield General portfolio stock, the transaction was beyond the purview of §10(b). By thus focusing on the absence of

harm to the receipient shareholders, the dissent simply ignores the fact that the statute was intended to safeguard not only the shareholders of a defrauded corporation, but its creditors as well. The Court noted in Bankers Life, id. at 12:

> . . . the fact that creditors of the defrauded corporate buyer or seller of securities may be the ultimate victims does not warrant disregard of the corporate entity. The controlling stockholder [Vesco in this instance] owes the corporation a fiduciary obligation—one "designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." Pepper v. Litton, 308 U.S. 295, 307.

And, to be sure, the creditors of ICC may be significantly and adversely affected when the asset base of the corporation is eroded by a portfolio security dividend.[14]

We therefore reject our dissenting brother's paean to literalness in construing the term "safe" to require the passage of consideration in order to inject the requisite significance into the disposition of securities. Learned Hand wisely counselled:

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out

14. In this regard, a portfolio security dividend may have a substantially different impact on creditors than an ordinary stock dividend. Since the latter does not involve a distribution of corporate assets, corporate creditors are unlikely to be affected by a decision to issue a stock dividend. Cf. Hafner v. Forest Laboratories, Inc., 345 F.2d 167, 168 (2d Cir. 1965).

> of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945). Accordingly, although in other contexts the term "sale" might appropriately be construed more "narrowly,[15] we find a rote emphasis on consideration inconsistent with the broad scope of protection under §10(b) for those who engage in transactions eventuating in the acquisition or disposition of securities.[16]

B. The Venue Question

The Fairfield Group asserts a second jurisdictional defect in this action, contending that venue was improperly laid in the Southern District of New York. This argument merits short shrift. The applicable provision of the 1934 Act, 15 U.S.C. §78aa, states in pertinent part:

> Any suit or action to enforce any liability or duty created by this chapter or rules and regulations there-

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15. For example, since the primary purpose of §16(b) is to secure equality among shareholders inter se by depriving insiders of the fruits of their preferred position, Kern County Land Co. v. Occidental Petroleum Corp., supra, it may be true, as we noted in Shaw v. Dreyfus, supra, that the statute's purpose would not be defeated by refusing to construe a pro rata distribution of securities as a "sale" by the corporation or a "purchase" by the recipient shareholders. This restrictive interpretation should not apply to §10(b), however, where the statutes protection was designed to cover the corporation's creditors as well as its shareholders. Supt. of Insurance v. Bankers Life & Cas. Co., supra.

16. Our dissenting brother's "fear" that our decision today signals the demise of the Birnbaum doctrine—limiting standing to sue under §10(b) to the "purchaser or seller" of securities—is wholly unfounded. Having determined that ICC's dividend of its Fairfield General portfolio stock was the kind of meaningful disposition of securities which Congress sought to protect under §10(b), it could not be more clear that ICC was the "seller" of those securities. Compare Birnbaum v. Newport Steel Corp., supra (the corporation lacked standing where its controlling shareholders sold his shares) with Ruckle v. Roto American Corp., supra (the corporation had standing where it had agreed to sell its own newly-issued shares).

> under . . . may be brought in any [district wherein any act or transaction constituting the violation occurred] . . .

In this case, ICC claims that a §10(b) violation occurred when it was fraudulently induced to spin-off its Fairfield General subsidiary. An essential element of that fraudulent scheme was the actual mailing of the spin-off dividend to the ICC shareholders. It is uncontroverted that the mailing was performed by ICC's transfer agent, the Marine Midland Bank, from its offices in Manhattan. Accordingly, since "any use of instrumentalities of the mails or other interstate facilities made within the forum district constituting an important step in . . . [the] consummation [of the fraudulent scheme] is sufficient," Hooper v. Mountain States Securities Corp., 282 F.2d 195, 204-05 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961), venue in the Southern District of New York is proper.

C. The Preliminary Injunction

With these jurisdictional hurdles behind us, we have little difficulty in affirming the preliminary injunction insofar as it restrains the Fairfield Group from disposing of the Boeing 707. Although an extraordinary remedy, a preliminary injunction is properly granted to preserve the statutes quo pendente lite where the balance of hardships tips decidedly toward the party requesting the temporary relief and that party has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation. Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738,

740 (2d Cir. 1953). ICC has easily satisfied both requirements.

Richardson and McAlpin, both former directors of ICC, have stated in their affidavits that information material to their decision to approve the spin-off of Fairfield General was withheld from them. Although raising an interesting application of the fraud provisions under §10(b), these uncontroverted statements certainly present "a fair ground for litigation and thus for more deliberate investigation." Id.

That the balance of hardships tips decidedly in favor of ICC cannot fairly be questioned. It appears from the record that the Boeing 707 is now[17] the sole substantial asset owned by Fairfield General or its subsidiaries. Its sale might well result in the dissipation of an important asset, leaving little for ICC to recapture if it should eventually succeed in this lawsuit. We have recognized that an asset freeze may be appropriate to assure compensation to those who are victims of a securities fraud. SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105-06 (2d Cir. 1972). Moreover, Judge Stewart has narrowly fashioned the injunctive decree so that it will not interfere with the operation of the aircraft.[18] Accordingly, we do not find that the district court abused its discretion by enjoining the sale of the Boeing 707 pendente lite.

17. According to Grady's affidavit, submitted on behalf of the Fairfield Group, Fairfield Aviation had, at one time, operated the Caldwell Airport in New Jersey and had owned "nearly a dozen aircraft."

18. Judge Stewart originally enjoined the Fairfield Group from disposing of "any and all other assets" of the companies, in addition to restraining the disposition of the Boeing 707. Upon application by the Fairfield Group, however, Judge Stewart modified his order to permit Skyways to meet its debt service obligations and other operating costs.

D. The New Jersey Suits by Skyways and the Fairfield Group

We turn finally to appellants' contention that the district court was without authority to enjoin the prosecution of the pending state court actions, one of which was instituted by Skyways to enforce the Boeing 707 lease, while the second was initiated by the Fairfield Group to recover certain books and records which ICC has refused to release to the Group. The limited authority of a federal court to stay a pending state court proceeding is embodied in 28 U.S.C. §2283 which states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Moreover, in construing this statute, we are counselled to resolve

> any doubts as to the propriety of a federal injunction against state court proceedings . . . in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 297 (1970). In light of this presumption against interference, we must agree with the Fairfield Group that the district court erred by enjoining the prosecution of the two state court suits.

In support of its request for this relief, ICC urges that the district court possessed the requisite authority under §21(e) of the 1934 Act (15 U.S.C. §78u) which, argues ICC, satisfies the "except as authorized by Act of Congress" language of §2283.[19] Section 21(e) provides:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may * * * bring an action * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Although this language empowers the SEC alone to obtain injunctive relief, we have held that, under certain circumstances, it may be construed to authorize a private party to enjoin a pending state court action where the very prosecution of that lawsuit furthers a violation of the securities laws. Studebaker Corporation v. Gittlin, 360 F.2d 692 (2d Cir. 1966).

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19. ICC also contends that the district court was authorized to enjoin the two New Jersey proceedings "in aid of its jurisdiction" since federal courts have exclusive jurisdiction over matters arising under the 1934 Act, as provided in Section 27. This claim was made without success in Vernitron Corporation v. Benjamin, 440 F.2d 105 (2d Cir), cert. denied, 402 U.S. 987 (1971). We said in Vernitron:

> [T]o justify an injunction of a state court action, '[i]t is not sufficient to show that the matter properly before a state court embraces issues within the compass of the federal suit, even if the federal court has exclusive jurisdiction over its case.' Greater Continental Corporation v. Schechter, 304 F. Supp. 325, 330 (S.D. N.Y. 1969), appeal dismissed 442 F.2d 1100 (2d Cir. 1970); accord, Lyons v. Westinghouse, 201 F.2d 510 (2d Cir. 1953). . . .
>
> The policy of the anti-injunction statute, 28 U.S.C. §2283, is to prohibit enjoining of state court suits except in those situations where the real or potential conflict threatens the very authority of the federal court. The only conceivable interference here would be an attempt by the state court to determine issues of federal law, a task which it certainly has not as yet undertaken and which in any event would be wholly without effect.

Id at 108.

ICC contends that our holding in Gittlin is applicable to this case. Its argument, accepted by Judge Stewart, is basically that but for the spin-off of Fairfield General, a transaction fraudulently induced in violation of §10(b), neither Skyways nor the balance of the Fairfield Group would enjoy the independent status effectively required to sue its former parent. Thus, ICC concludes that, as in Gittlin, where Gittlin's state court action against Studebaker was permanently enjoined because Gittlin had obtained the necessary stockholder authorizations by violating the Proxy Rules issued under §14(a) of the 1934 Act, here too, the state court actions are predicated on violations of the securities laws.

There is, however, a critical distinction between Gittlin and the instant case. In Gittlin, the injunction issued after a decision on the merits holding that Gittlin had, in fact, violated §14(a), while in this case, ICC's claim of a §10(b) violation, though presenting a fair ground for subject matter jurisdiction and a temporary injunction has yet to result in a judgment on the merits after trial. To be sure, the SEC, under §21(e), is empowered to secure a preliminary injunction in Atlantic Coast Railroad, we decline to extend the Gittlin rationale of the facts of this case.

This conclusion, moreover, is buttressed by our decision in Vernitron Corporation v. Benjamin, 440 F.2d 105 (2d Cir.), cert. denied, 402 U.S. 987 (1971), decided subsequent to Gittlin. In Vernitron, a preliminary injunction was sought and granted to restrain a pending state court action which, the moving party claimed, was brought to enforce a contract obtained by fraudulent conduct violative of §10(b). We reversed, finding Gittlin "inapposite in that the prosecution of the state action there relevant would itself have furthered the violation of the Securities Exchange Act." Vernitron Corporation v. Benjamin, supra,

440 F.2d at 108. Since the facts here bear greater resemblance to Vernitron than Gittlin, we believe our decision in Vernitron to be the more applicable. Accordingly, we vacate so much of the preliminary injunction against the Fairfield Group that enjoins further prosecution of the two actions pending in New Jersey Superior Court, without prejudice to renewal of the application upon a showing that prosecution of these actions has interfered or threatens to interfere with the district court's jurisdiction or a judgment issued by it.

III. The Vesco & Co. Appeal

The circumstances surrounding appellant Vesco & Co.'s alleged role in the purported scheme to defraud ICC are, in the context of this sprawling and labyrinthine lawsuit, remarkably straightforward. Indeed, our knowledge of the details relating to Vesco & Co. derives principally from an affidavit submitted by Milton Stern, counsel for Vesco & Co., in support of its unsuccessful motion to dismiss the complaint. Vesco & Co., it appears, was incorporated in Delaware on July 12, 1972, as an estate planning device for Robert Vesco. At that time, Vesco exchanged 800,000 shares of ICC common stock for all of the preferred stock of Vesco & Co. The common stock of Vesco & Co. is owned by Patricia Vesco, Vesco's wife, as custodian for Vesco's children. The sole asset of Vesco & Co. is the block of ICC common stock which, through the additional contributions of Vesco's children, totals 846,380 shares. Furthermore, we have been advised that the officers of Vesco & Co. are Mrs. Vesco and defendant Shirley Bailey, Vesco's personal secretary.

On facts such as these, which can hardly be characterized as common, routine or without the semblance of taint, ICC moved for and was granted a preliminary injunction en-

joining Vesco & Co. from disposing of the 846,380 shares of ICC common stock pendente lite. Judge Stewart found[20] that Vesco & Co. was merely Vesco's alter ego and, as such, would be equally liable should ICC sustain its claim of a §10(b) violation against Vesco. The district court also granted ICC's motion for preliminary relief restraining Vesco & Co. from prosecuting a pending state court action, finding such injunctive relief necessary to protect and effectuate its judgment, entered with the consent of ICC, in SEC v. Vesco et al., supra.

A. Vesco & Co.'s Preliminary Defenses

In attacking the preliminary injunction, Vesco & Co. contends—as did the Fairfield Group—that the district court lacked subject matter jurisdiction under the 1934 Act. It adds that this jurisdictional basis is essential here because in personam jurisdiction over Vesco & Co., a Delaware corporation doing no business in New York, can only be sustained under the nationwide service of process authorized by the 1934 Act, 15 U.S.C. §78aa—an issue raised also in the Fairfield Group appeal. The district court denied this claim holding that, as a court of equity, it could pierce the corporate veil and treat Vesco & Co. as the equivalent of its dominant shareholder, Vesco. Thus, since ICC had unquestionably stated a claim under §10(b)

20. We must again comment on the unsatisfactory method used by the district court in "formulating" its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). See n. 5, supra. Vesco & Co. asserts that not only did Judge Stewart adopt in haec verba the proposed findings submitted by ICC, but that he followed this procedure without prior notice to Vesco & Co. Judge Stewart, upon learning of the absence of notice, however, offered Vesco & Co. the opportunity to submit additional evidence by affidavit or by way of an evidentiary hearing. Vesco & Co. declined this offer. Furthermore, since the district court's findings were based solely on documentary evidence, we shall not place heavy reliance upon them in evaluating the propriety of the injunctive relief granted. See n. 5, supra. Accordingly, we do not believe that Vesco & Co. was prejudiced by the district court's procedures or that reversal would serve the interests of due process.

against Vesco, the court had jurisdiction as well over Vesco & Co. We agree.[21]

Although we need not labor the principle that the law will ordinarily treat the corporation as an entity distinct from its shareholders, it is equally well-established that "whenever it is necessary to relieve or to protect from frauds, the corporation may be disregarded as against the responsible parties." 1 Fletcher Cyc. Corp., Perm. Ed. §44.; Cf. In re Gibraltor Amusements, Ltd., 291 F.2d 22 (2d Cir.), cert. denied, 368 U.S. 925 (1961). In this case, we note that ICC's detailed allegations of fraud against Vesco, personally, have now ripened into a default judgment.[22] Moreover, the virtual identity of interest between Vesco and Vesco & Co. is uncontroverted, as is the fact that Vesco actually transferred his ICC common stock to Vesco & Co. at a time when he was actively engaged in his allegedly fraudulent scheme. Finally, we have sustained 1934 Act jurisdiction over a corporation that participated in the fraudulent scheme solely as transferees for the illicit fruits. SEC v. Manor Nursing Centers, Inc., supra (jurisdiction over defendant Capital Cities Nursing Centers, Inc.). Thus, although ICC does not claim that the ICC common stock itself represents the fruits of Vesco's fraudulent conduct, nevertheless, we believe that the district court had ample power, as a court of equity, to reach those assets under the jurisdictional purview of the 1934 Act.

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21. On this appeal, ICC has argued that there was jurisdiction under the 1934 Act on the alternative ground of ancillary jurisdiction premised on the final judgment entered with the consent of ICC in SEC v. Vesco, et al., supra. The argument runs that the appointment of a Special Counsel and a board of directors was the equivalent of appointing a receiver, and that in Esbitt v. Dutch-American Mercantile Corp., 335 F.2d 141 (2d Cir. 1964), we recognized that "if the receiver's suit is to aid in the accomplishment of the ends sought and directed in the SEC action, it is ancillary to the main action for jurisdictional purposes." Id. at 142. Although we consider this point interesting, we find it unnecessary to decide whether the analogy is apt.

22. The district court granted the default judgment against Vesco on October 5, 1973.

Vesco & C also contends that the complaint was defective in fa ng to state a valid claim against it. Admittedly, the olitary reference to Vesco & Co. in ¶5(r) of the comp int—"a Delaware corporation to which defendant Ves and his children have transferred certain of their asse —is not replete with detail. Yet, the "notice of plead g" mandated by Rule 8(a) of the Federal Rules of Civ Procedure requires that the complaint be construed lib rally, Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi, v Durning, 139 F.2d 774 (2d Cir. 1944); and "jurisdiction . . is not defeated . . . by the possibility that the ave ments might fail to state a cause of action on which . . [the pleader] could actually recover." Bell v. Hood, 32 U.S. 678, 682 (1946). See A.T. Brod & Co. v. Perlow, 3 F.2d 393, 398 (2d Cir. 1967). Accordingly, in view of e more than adequate allegations of fraud against Ves , the allegation that he transferred certain assets to Ve o & Co. was sufficient to suggest that ICC would urge piercing of the corporate veil as the basis for judgmer against Vesco & Co.[23] Moreover, in light of the alleg tions in the affidavits accompanying the applications f the preliminary injunctions, the interstices of the comp int have been filled in. We would be acting contrary to the spirit of the Federal Rules if we did not recogni e the ease with which the complaint may be amended u der these Rules to supply any additional allegations re uired to make the complaint more informative.

23. Vesco & o.'s reliance on the pleading requirements of Rule 9(b) of the Fed. R. C P. is, therefore, misplaced. Rule 9(b)'s requirement that "averments of aud . . . be stated with particularity" is inapplicable here since ICC did ot proceed on the theory that Vesco & Co., itself, committed fraud, but rat r that Vesco perpetrated the securities violations and then sought to shiel his assets from the reach of his victim by transferring them to Vesco & C

B. The Preliminary Injunction

Turning to the propriety of the injunctive relief fashioned by the district court, we find, for the reasons substantially set forth in Part II, that the district judge was well within his discretion in enjoining the disposition of the 846,380 shares of ICC common stock. With Vesco now well beyond the reach of ICC and the United States, this large and perhaps controlling block of ICC common stock is indeed a critical asset should ICC prevail on the merits against Vesco & Co. Sale of the stock would only aggravate the alleged fraud. Indeed the Vesco family, as sole shareholders, are unlikely to evidence concern over improper disposal of this asset. Moreover, as a holding company, Vesco & Co. will hardly experience any disruption in operations—an element to be considered by the district court in evaluating the appropriateness of an asset freeze. See SEC v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1106. Accordingly, the balance of hardships once again tilts in ICC's direction.

The other half of the preliminary injunction equation set forth by Hamilton Watch and its progeny—the existence of serious questions establishing a fair ground for further litigation—has also been satisfied by ICC in its claim against Vesco & Co. That Vesco, himself, is responsible to ICC because of his fraudulent scheming, has now been established by the default judgment. The only question which remains, therefore, is whether ICC may pierce the corporate shell and reach the assets contained within it. As we have already made clear, both the timing of incorporation and the precise identity between the stockholders and officers of Vesco & Co. and Vesco, his family, and personal secretary are more than sufficient to provide fertile ground for "more deliberate investigation."

C. The New Jersey Suit by Vesco & Co.

That portion of the preliminary injunction restraining Vesco & Co. from prosecuting its pending state court action still remains for our consideration. The state suit, filed in the Chancery Division of the Superior Court of New Jersey, is based on a complaint containing four counts in a derivative action filed by Vesco & Co. on behalf of ICC. Counts one and two seek compensatory and punitive damages against Laurence Richardson, a former director, and Gary Benjamin, a former officer of ICC for alleged breach of their fiduciary obligations to the company. Count three charges that ICC "has paid, or is contemplating payment, of, the personal legal fees and expenses" for three former directors, Richardson, Frank Beatty, and Wilbert Snipes, incurred in their defense of actions against them for mismanagement. Vesco & Co. prays for an injunction against future payments, and the return of any such reimbursements to date. Finally, count four of the complaint alleges that the former board of directors of ICC "abdicated their responsibilities as directors" by consenting to the "Final Judgment of Permanent Injunction and Appointment of Special Counsel and Directors" which terminated ICC's involvement in SEC v. Vesco et al., supra. As relief, Vesco & Co. seeks, inter alia, to enjoin the court-appointed board of directors from exercising their duties.

In granting ICC's request to enjoin this lawsuit, Judge Stewart relied on the exception in §2283 which authorizes a federal court to stay a state court proceeding "to protect or effectuate its judgments." Although Atlantic Coast Railroad teaches that this exception must be narrowly construed, it clearly supports injunctive relief restraining count four of Vesco & Co.'s New Jersey action. This count represents a direct assault on the Final Judgment entered

by Judge Stewart in SEC v. Vesco, et al., supra, and constitutes an attempt to frustrate the court's order appointing a new board of directors for ICC by seeking to enjoin the functioning of the board. Accordingly, we have little difficulty in sustaining the preliminary injunction restraining Vesco & Co. from proceeding with count four of its complaint.

We reach a contrary conclusion, however, with respect to the remaining counts of this state suit. We do not find in these counts the kind of real or potential conflict with the Final Judgment in SEC v. Vesco, et al., supra, which we believe is required to justify the disfavored intervention into the orderly proceedings of a state court. Although the Final Judgment vests Special Counsel with the power to prosecute claims on behalf of ICC, the court's order does not purport to override the traditional right of a stockholder to sue on the corporation's behalf. See 13 Fletcher Cyc. Corp., Perm. Ed. §5940. Even were we to accept ICC's contention that appointment of Special Counsel and a new board of directors was equivalent to the appointment of a receiver, it is well settled that a derivative suit could be instituted, provided a proper demand had been made and refused by the receiver. Lucking v. Delano, 129 F.2d 283, 286 (8th Cir. 1942); 13 Fletcher Cyc. Corp., Perm. Ed. §5966. Accordingly, we vacate so much of the preliminary injunction which restrains Vesco & Co. from prosecuting counts one–three of its pending state court action, without prejudice to renewal of the application upon a showing that prosecution of these counts has interfered or threatens to interfere with the district court's jurisdiction or a judgment issued by it.

IV. The Andean Appeal

The seeds of Andean's involvement in the instant lawsuit were planted on July 27, 1973. On that date, United

States Customs officials seized the yacht, Patricia III, while it was undergoing repairs at the Merrill Stevens Dry Dock Company in Miami, Florida. The yacht was of Panamanian registry, the registration certificate having been issued to Andean, a Panamanian corporation. The vessel was seized for allegedly failing to pay duties pursuant to relevant Tariff Schedules of the United States. These payments are required as duty assessments on yachts of foreign origin which enter the United States while chartered to or owned by a resident of the United States. In this instance Vesco was that American resident.

One week after the yacht's seizure by the United States, on August 3, ICC moved for and Judge Ward granted a temporary restraining order enjoining Vesco from removing the yacht from its Miami berth.[24] On August 14, Andean appeared as intervenor before Judge Ward and subsequently, on August 16, submitted a written application supported by an affidavit of counsel to Judge Sewart seeking to dissolve the restraining order on the ground that it and not Vesco was the owner of the Patricia III. ICC's response was that Andean was nothing more than a nominee for Vesco, and that the source of the funds used to purchase the yacht was Vesco. In the alternative, ICC claimed that the Columbus Trust Company [Columbus Trust] which held a $1,500,000 mortgage on the yacht, was either a mere conduit for moneys provided by Vesco or was, itself, independently liable to ICC as a result of

24. On the same day, August 3, Andean filed a petition in the United States District Court for the Southern District of Florida seeking release of the yacht from the Government's seizure. On August 14, ICC intervened in the Florida action to oppose release. Thereafter, Judge Mehrtens entered an order providing in part:

> No person shall move or attempt to move the vessel 'Patricia III' from its present location on the Miami River, pending ruling by this Court or by the United States District Court for the Southern District of New York on the petition for permanent injunctive relief on behalf of intervenor-petitioner ["ICC"].

its participation in Vesco's alleged scheme to loot the assets of ICC.[25]

In an effort to support its serious charges, ICC deposed Roland Boddy, Captain of the Patricia III, and Joseph Sutton, President of Merrill Stevens. ICC also sought to take the deposition of Eusebio Morales, Andean's sole shareholder, but Morales refused to appear in Miami for the deposition despite Judge Stewart's order so requiring.[26] ICC also failed in its effort to depose Donald Aberle, President of Columbus Trust, who, like Morales, preferred to remain in the snug harbor of Nassau. Unlike Morales, Aberle had not been ordered by the Court to appear. Instead, and by way of response to ICC's charges that Andean and/or Columbus Trust were fronts for Vesco, Andean submitted affidavits by Morales, Aberle, several other officers of Columbus Trust and by Virgil Coakley, an assistant to the Controller of Property Resources Limited [PRL], a corporation in which ICC formerly had an indirect interest, and the assets of which were allegedly misappropriated by Vesco with the aid of Columbus Trust.

On October 2, 1973, an evidentiary hearing was held before Judge Stewart at which David Warham, former Controller of PRL, and Charles Bliven, a yacht broker who arranged the sale of the Patricia III to Andean, testified on behalf of ICC. Three days later, on October 5, 1973, the district judge issued his preliminary injunction, enjoining Andean and Columbus Trust from moving the Patricia III, an order from which only Andean has appealed.[27]

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25. Although Columbus Trust was not named as a defendant in the original complaint, ICC filed an amended complaint on September 7, 1973, curing this omission.

26. Judge Stewart had originally granted Morales' request to be deposed in Nassau, but, upon reargument by ICC, ordered Morales to appear in Miami.

27. At the time the preliminary injunction was ordered, Columbus Trust had not been served with process. The in personam jurisdiction requisite to the injunction's issuance against it, 7 J. Moore, Federal Practice ¶65.03[3] at

A. The Preliminary Injunction

At the outset, we note that the question before us is quite narrow. Since both Vesco, against whom a default judgment has already been entered, and Columbus Trust, a Bahamian corporation, are effectively immunized from execution because they both are beyond the reach of the court, enjoying the protection of the Bahamian government, it is indisputable that ICC would be irreparably harmed should we permit this yacht, valued in excess of one million dollars, to depart our shores and sail to other lands, perhaps to a rendezvous with her alleged owner Vesco. Accordingly, with the balance of hardships so obviously in ICC's favor, we need decide only whether Judge Stewart abused his discretion in determining that serious questions were raised concerning the source or sources of the funds used to purchase the yacht and Columbus Trust's alleged role in defrauding ICC. Sonesta International Hotels Corp. v. Wellington Associates, supra; Checker Motors Corp. v. Chrysler Corp., supra; Hamilton Watch Co. v. Benrus Watch Co., supra. After a careful review of the record, we find no abuse.

Morales's affidavit discloses that Andean was formed in February, 1973, when Morales contributed $10,000 in return for all of the corporation's stock. After its incorporation, neither Andean nor Morales played more than a passive role in the purchase or operation of the Patricia III. Instead, it was Aberle who negotiated for the acquision of the yacht from Charles Bliven & Co., yacht brokers. On May 14, 1973, Columbus Trust wired $1,326,000 to Bliven, and Andean took title to the yacht.

65-31 (2d ed. 1973), was found by Judge Stewart in Columbus Trust's voluntary appearance before the court through its representative at the Boddy deposition and the submission of affidavits by its officers on behalf of Andean. Whether this degree of participation is sufficient for jurisdictional purposes as to Columbus Trust is a question not before us, since Columbus Trust has not appealed from Judge Stewart's order. The district court clearly had the necessary jurisdiction over Andean by its intervention in the action, and Andean does not claim otherwise.

Thereafter, Andean entered into a charter party with Mackinley Limited, a Bahamian corporation whose interest in chartering a luxury yacht had, according to Aberle, initially prompted his negotiations with Bliven. Mackinley, however, was hardly a stranger to Aberle, who, coincidentally, happened to be Mackinley's Secretary. Moreover, it does not appear wholly without significance or is it perhaps simply another coincidence, that a letter sent by Aberle to the Registrar-General of Nassau in February, 1973 stated that Vesco was appointed as Director and President of Mackinley. To add yet a third curious note, we find that Aberle subsequently termed this appointment "incorrect" in a second letter to the Registrar-general, sent shortly after the first, in which Aberle made the rather unusual request that the first letter be returned. In any event, Mackinley's strange background aside, it arranged with Andean for a one-year charter, with an option to renew for five additional one-year periods, at the rate of $30,000 per month.

On June 20, 1973, Vesco, Patricia Vesco, his wife, and Vesco's family boarded the yacht (renamed Patricia III after its purchase) and Vesco and his family remained it sole users until shortly before it put into Miami for repairs. The record discloses that Vesco submitted plans for the extensive refurbishing and refitting of the yacht's interior. Indeed, in July, 1973 a check for $40,000 was issued by Patricia Melzer [Mrs. Vesco's maiden name], on behalf of Mackinley, Ltd., to Merrill Stevens Dry Dock Company in partial payment for work performed on the yacht. Payment on this check was stopped, however, and it was replaced with a check issued by Columbus Trust.

Turning our attention to Columbus Trust and its pedigree, we observe that it was incorporated by Aberle and one Dobbie in 1969 as a vehicle for those seeking to invest

capital in the Bahamas, a tax haven not unknown to the initiated. By 1973, Dobbie's interest was acquired by the Bahamas Commonwealth Bank, Ltd. [BCB], a defendant in this lawsuit. BCB was in turn controlled by Norman LeBlanc, another defendant and both are also defendants in SEC v. Vesco et al., supra, against whom default judgments have been entered in the SEC action.

In March, 1973, Aberle and two other Bahamians purchased BCB's interest in Columbus Trust. In that same month, according to Warham's testimony at the evidentiary hearing before Judge Stewart, PRL, of which LeBlanc was a director, arranged to have Columbus Trust manage the not insignificant sum of $40,750,000 then held in certificates of deposit in PRL's account in London. Warham also testified that this important arrangement was concluded at the behest of Vesco, who, though neither a director nor officer of PRL, appeared to have a strong influence over the management of PRL's funds. Finally, Warham described in some detail a series of transactions by which PRL—which was controlled by a corporation (Value Capital Limited) in which ICC owned a controlling interest—was subsequently transferred by Vesco, through ICC's sale of its interest in Value Capital Limited, to a corporation dominated by LeBlanc. This series of transactions have been alleged by both the SEC and ICC to have violated the securities laws.

Once Columbus had control of PRL's $40,750,000 it proceeded to purchase $5,700,000 in Costa Rican bonds from BCB. Another $3,350,000 is, according to Coakley's affidavit and a telex exhibit from a Panama bank, deposited in the Banco Nacional de Panama. The balance of $31,700,000 remains in London, frozen in PRL's account by an order of the English Chancery Court.

Upon the foregoing, we can hardly say that ICC has failed to raise serious questions concerning the source of funds used to purchase the Patricia III. One thing appears clear: Andean performed no function other than that of a mere nominee or shell. Aberle undertook all negotiations for the yacht's acquisition, and it is undisputed that Columbus Trust supplied both the $1,326,000 purchase price and the substantial sums subsequently required to repair and refit the yacht. Moreover, at the evidentiary hearing, ICC submitted an audited financial statement of Columbus Trust revealing a net worth of only $266,808 as of March 31, 1972. Although this net worth figure related to a period more than one year prior to the yacht's purchase, we are unaware of any effort by Columbus Trust to rebut this evidence by introducing a more recent financial statement, although such information is under the control of Columbus Trust. We conclude on the totality of circumstances that ICC has made a sufficient showing of Vesco's interest in the yacht to sustain the injunctive relief granted.[28] Accordingly, we need not pass upon ICC's alternative contention, also accepted below, that it has demonstrated with sufficient likelihood Columbus Trust's liability to ICC through its mishandling of the PRL funds.

B. The Posting of Security

Andean claims that the district court erred in denying its request for security by ICC, pursuant to Fed. R. Civ. P. 65(c). Rule 65(c) states, in pertinent part:

28. Andean's reliance on Aschkar v. Curtis, 327 F.2d 306 (9th Cir. 1964), in which the Ninth Circuit refused to interpret the nationwide service of process authorized under the 1934 Act, 15 U.S.C. 78aa, as authority for attachment of defendants' property outside the forum district, is misplaced. Although the effect of the preliminary injunction here is similar to an attachment, the method of obtaining this restraint is clothed with far greater protections for the defendant than under an attachment procedure.

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper. . . .

In construing this language, we have stated that, especially in view of the phrase—"as the court deems proper" —the district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined. Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir. 1961). See also Urbain v. Knapp Brothers Manufacturing Co., 217 F.2d 810 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1955). Andean argues, however, that its inability to move the yacht has been costly, both in the loss of charter revenues and in additional maintenance expenses. ICC's response to this is quite simple. It claims that even were the restraint lifted, Andean would be unable to remove the yacht because of a forfeiture action brought by the United States in the Southern District of Florida for the unpaid assessed duties.

Subsequent to the argument of this case, we received a copy of findings of fact and conclusions of law signed by Judge Mehrtens in the actions pending before him in Florida. Although he found Andean liable for customs duties in the amount of $60,000, and indebted to the Merrill-Stevens Dry Dock Company in the sum of $77,474 for breach of a repairs and improvements contract, Judge Mehrtens denied the Government's claim for forfeiture. Thus, should Andean satisfy these judgments, it would be barred from removing the Patricia III only by the preliminary injunction granted below. Accordingly, in light of the Florida dispositions, we remand to the court below for reconsideration of Andean's motion for security.

Although we have scarcely plumbed the depths of Vesco's alleged financial manipulations, we have attempted to de-

scribe the intricacies of the web spun by him and his associates in their alleged scheme to ensnare the assets of ICC and its subsidiaries. Emerging from this maze of securities schemes, of corporate shells and subsidiary spin-offs, one point stands out in bold relief: the ingenious plotter cannot find a medium more supple than the world of securities to effectuate his design. Thus, we find in these appeals further proof of the wisdom in adopting a flexible approach to the application of Section 10(b), a judicial construction consonant with that Section's broad prophylactic purpose. Confidence in our securities markets can only be maintained by establishing a protective shield which cannot be circumvented by recourse simply to the novel, to the unexpected, or to entanglements difficult to unravel. We remand to the district court for further proceedings not inconsistent with this opinion.

MULLIGAN, Circuit Judge (concurring in part and dissenting in part):

This dissent is limited to the Fairfield Group Appeal covered in Part II of the majority opinion, and in particular to that section thereof which holds that the "purchase or sale" requirement of the Act has been satified in this case.

The crucial question here is whether or not some deceptive device or scheme was employed by Vesco and his group "in connection with the purchase or sale of any security" within the meaning of §10(b) and Rule 10b-5. The theory of plaintiff International Controls Corp. (ICC) is that Vesco, a corporate buccaneer, was intent upon securing for his personal use a Boeing 707, which was owned by Skyways Leasing Corp. and leased to ICC on terms which were distinctly disadvantageous to ICC. In addition it had been redesigned and refurbished at great ex-

pense to ICC to satisfy Vesco's sybaritic tastes rather than to accomplish the legitimate corporate purposes of ICC. Vesco, who was a major shareholder in ICC and at various times a holder of important corporate positions in the company, is alleged to have wasted corporate assets and generally to have deceived the ICC board of directors. Unquestionably, as the Fairfield Group admits, a complaint of corporate mismanagement in a stockholder derivative action would lie here. Although Mr. Justice Douglas did announce in Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971), that "Congress by §10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement," it seems reasonably clear that the existence of internal corporate mismanagement does not insulate fraudulent practices which are induced by a controlling influence to the detriment and loss of a corporation, provided, of course, that the transaction is otherwise within the purview of §10(b) and Rule 10b-5. See Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969); Ruckle v. Roto American Corp., 339 F.2d 24 (2d Cir. 1964).

The first question is whether or not the fraud practised was "in connection with" the sale or purchase of securities. The pattern of misbehavior urged is novel and no precedent is adduced to support the proposition that it is connected to a security sale. However, I agree that the statute is to be construed liberally, and not restrictively, where its terms permit flexibility. Superintendent of Ins. v. Bankers Life & Cas. Co., supra, 404 U.S. at 12.

Vesco had originally secured the Boeing 707 through Skyways, the wholly-owned subsidiary of Fairfield Aviation Corp. Fairfield Aviation, in turn, was totally owned by ICC. The negotiation of the lease and the transformation

of the commercial plane into a luxury air carrier were achieved by Vesco without any sale or purchase of securities. The theory of the complaint here is that, because Vesco, not otherwise a worrisome type, was concerned that the theretofore complacent and amenable board of ICC might prove troublesome, he engineered a series of devious moves to ensure his continuing use of a corporate asset for private pleasure. Fairfield General Corp. was therefore created, and all of the shares of Fairfield Aviation, were transferred to it. A dividend of Fairfield General shares to the stockholders of ICC was then declared by the board of ICC. As a result of these activities, Skyways and the plane came under the control of Vesco and three associates, who made up the board of directors of Fairfield General.

Obviously, the manipulation charged is indeed intricate, and separating the flim from the flam may well prove to be difficult. In any event, whether there exists between the fraud allegedly practiced upon ICC and the spin-off a nexus sufficient to satisfy the "in connection with" requirement of the statute (see Note, The Controlling Influence Standard in Rule 10b-5 Corporate Mismanagement Cases, 86 Harv. L. Rev. 1007, 1010-15 (1973)) presents a question we need not now determine definitively. Since this is an appeal from a preliminary injunction which merely maintains the status quo, with the balance of hardships tipping sharply in ICC's favor and serious litigable issues presented, there is enough to sustain the injunction without determining the question with finality. See Exxon Corp. v. City of New York, 480 F.2d 460, 464 (2d Cir. 1973); Gulf & Western Indus., Inc. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687 (2d Cir. 1973); A. H. Bull Steamship Co. v. National Marine Engineers' Beneficial Ass'n, 250 F.2d 332, 337 (2d Cir. 1957); American Federation of Musicians v. Stein, 213 F.2d 679 (6th Cir.), cert. de-

nied, 348 U.S. 873 (1954); 601 West 26 Corp. v. Solitron Devices, Inc., 291 F. Supp. 882 (S.D. N.Y. 1968), aff'd, 420 F.2d 293 (2d Cir. 1969); Garland v. Ruskin, 249 F. Supp. 977, 980 (S.D. N.Y. 1965).

A key jurisdictional question remains. Was there a "purchase or sale" of securities here under §10(b) and Rule 10b-5? The majority, while finding no "purchase or sale" in the exchange of securities between Fairfield Aviation and Fairfield General, finds the spin-off, the stock dividend of Fairfield General shares to the stockholders of ICC, to be such a "purchase or sale" within the 1934 Act and Rule. It is at this point that I respectfully but firmly part company with the majority.

Chief Judge Kaufman candidly admits that there is no precedent for the holding in this case, and, it should be added, the technique adopted by the majority was not even suggested by the appellee or by the SEC in its amicus brief. The majority simply equates purchase and sale with acquisition and disposition of securities, even though no consideration or value or price is involved in the transaction. This is not only unprecedented, but is contrary to the holding of the court in Shaw v. Dreyfus, 172 F.2d 140 (2d Cir.), cert. denied, 337 U.S. 907 (1949). The question before the court there was whether the receipt of stock rights concededly tantamount to a stock dividend was within the "purchase or sale" definition of the 1934 Act, §3(a)(13) & (14), 15 U.S.C. §78c(a)(13) & (14), which is precisely the definitional section involved here. While §16 (b), rather than §10(b), was the provision allegedly violated in Shaw, the court there, in applying the definition of "purchase or sale," stated: "The popular or accepted import of words furnishes the general rule for the interpretation of statutes." Id. at 142 (footnote omitted). The court found that "purchase or sale" means that some price

cr consideration must be involved in the transaction in shares. Since the popular and accepted meaning of "purchase or sale" still imports consideration, and since there is admittedly no precedent for any §10(b) construction which would eliminate consideration, I fail to see any basis for a differing interpretation. In fact, it is not so much an interpretation as it is an evisceration. Surely, the use of "purchase or sale" was an indication that Congress intended to place certain limitations upon the scope of §10(b). Congress did not declare that §10(b) was to apply to all "transactions involving securities" or all "dispositions of securities." Instead, it chose terms which have had, and still retain, a conceptual significance now abandoned. In effect, the majority is construing "purchase or sale" to include no purchase and no sale. If another definition of the coverage of the Act is to be provided, it must be provided by Congress and certainly not by a panel of this court.

Section 3(a)(13) & (14) of the Act defines "purchase or sale" to include a contract to acquire or dispose of securities. There was here no contract to dispose of or to acquire securities, and there was no sale by ICC or purchase by ICC stockholders. The corporation received nothing in exchange for the dividend and the stockholders paid nothing. If a corporate spin-off of a "portfolio subsidiary" is a purchase or sale simply because it involves a stock transaction or the disposition of securities by a corporation, then a normal corporate stock dividend, a gift of shares or a distribution of securities by a fiduciary can also be found to be a purchase or sale. The majority states that the scope of protection under §10(b) extends to "those who engage in transactions eventuating in the acquisition or disposition of securities." If there is to be any limitation upon the cases to which this broad

definition may be applied in the future, the majority opinion gives no indication of what the guidelines may be, thus opening the door to future litigation which will require continuing appellate interpretation.

The majority emphasizes that the misbehavior here is the type meant to be proscribed by §10(b) and that the statute must be read flexibly.[1] Logically, this can only mean that the manipulative and deceptive devices or contrivances referred to in §10(b) and the further refinement of them in subsections (a), (b), and (c), of Rule 10b-5 should be construed broadly to encompass the myriad schemes of the malevolent and the greedy. See SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963). While the Act and the Rule have this substantive fluidity, the fraud alleged must be in connection with a "sale or purchase." A flexible approach does not permit a court to extend the terms of a statute beyond their fair import.

The protection of the statute and the Rule is extended only to a "seller or purchaser." This has been the law of this circuit and other circuits[2] since it was announced by Judge Augustus N. Hand of this court in Birnbaum v. Newport Steel Corp., 193 F.2d 461, cert. denied, 343 U.S. 956 (1952). This principle was recently reaffirmed in GAF Corp. v. Milstein, 453 F.2d 709, 721 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972), wherein Judge Kaufman noted that this court has steadfastly refused to extend

1. It should be noted that in Bankers Life, supra, relied upon by the majority as support for a flexible approach to the Act, there clearly was a sale of securities, since Manhattan Casualty Co., the complaining seller there, sold almost $5,000,000 in bonds. 404 U.S. at 9.

2. See, e.g., Mount Clemens Indus., Inc v. Bell, 464 F.2d 339 (9th Cir. 1972); Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970); Simmons v. Wolfson, 428 F.2d 455 (6th Cir. 1970), cert. denied, 400 U.S. 999 (1971); Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), cert. denied, 398 U.S. 950 (1970); City Nat'l Bank. v. Vanderboom, 422 F.2d 221 (8th Cir.), cert denied, 399 U.S. 905 (1970); Jensen v. Voyles, 393 F2d 131 (10 Cir. 1968); Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir.), cert. denied, 389 U.S. 977 (1967).

the reach of 10b-5 to give standing to an issuer. While the question of standing has not specifically been raised here,[3] I fear that the decision of the majority may portend the demise of the Birnbaum rule. We found in Birnbaum that Congress has determined that the umbrella of protection is to be extended only to purchasers and sellers in connection with a purchase or sale of securities. Although this rule has been criticized,[4] it serves the salutary purpose of foreclosing limitless liability under §10(b). See Bradford, Rule 10b-5: The Search of a Limiting Doctrine, 19 Buffalo L. Rev. 205 (1970).

Although Veco is at best an unsympathetic figure, and his hegira, whether to the Bahamas, Costa Rica or even to Glubbdubdrib, hardly inspires confidence in his character, this is not adequate cause for a panel of this court to rewrite the statute and ignore precedent. "[W]e are not free to adopt a construction that not only strains, but flatly contradicts, the words of the statute." Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418, 427 (1972).

I respectfully dissent.

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3. In this area of the law, the distinction is not always made between the definition of "purchse or sale" for the purpose of determining the coverage of the statute, and he definition of "purchaser or seller" for the purpose of ascertaining who has standing to sue. See SEC v. National Securities, Inc., 393 U.S. 453, 467 n. 9 (1969); Note, SEC, Rule 10b-5—"In Connection With the Purchase or Sale of Any Security" Restriction: Need for Analytical Precision, 5 Colum. . of L. & Soc. Prob. 28 (Aug. 1969). Although the decision here relates to he coverage of §10(b), it may also have implications for the standing doctrin as well.

4. See, e.g., Boon & McGowan, Standing to Sue Under SEC Rule 10b-5, 49 Texas L. Rev. 317 (1971); Comment, The Purchaser-Seller Rule: An Archaic Tool for Dtermining Standing Under Rule 10b-5, 56 Geo. LJ. 1177 (1968); Comment, The Purchaser-Seller Requirement of Rule 10b-5 Reevaluated, 44 U. Colo L. Rev. 151 (1972); Comment, The Decline of the Purchaser-Seller Reuirement of Rule 10b-5, 14 Vill. L. Rev. 499 (1969).

Order of the United States District Court for the Southern District of New York, dated July 3, 1973 (copy obtained from Clerk of District Court on July 5, 1973)
(Filed July 5, 1973)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 CIV. 2518 (CES)

INTERNATIONAL CONTROLS CORP.,
Plaintiff,

-against-

ROBERT L. VESCO, et al.,
Defendants.

Plaintiff International Controls Corp., having moved this Court by Order to Show Cause dated June 8, 1973 for an order:

1. Enjoining, pedente lite, defendants Fairfield General Corporation, Fairfield Aviation Corporation and Skyways Leasing Corporation, their directors, officers, agents, servants, employees and attorneys and those acting in concert with them, from prosecuting or taking any steps in furtherance of (i) an action entitled "Fairfield General Corporation, a New Jersey corporation, Fairfield Aviation Corporation, a New Jersey corporation, and Skyways Leasing Corporation, a New Jersey corporation, plaintiffs, v. International Controls Corporation, a corporation of the State of Florida, defendant" pending in the Superior Court of New Jersey Chancery Division, Essex County, and (ii) an action entitled "Skyways Leasing Corporation, a New Jersey corporation v. International Controls Corporation, a Florida corporation," Docket No. L-28210-73, pending in the Su-

perior Court of New Jersey, Law Division, Essex County, pending final determination of International Controls Corp. v. Robert L. Vesco, et al; and

2. Enjoining, pedente lite, defendants Robert L. Vesco, Vesco & Co., Skyways Leasing Corporation, Fairfield General Corporation, Fairfield Aviation Corporation, Frank G. Beatty, Joel Grady and Alwyn Eisenhauer, from, directly or indirectly, using, selling, encumbering or otherwise disposing of the following properties without the approval of the Court:

(i) 846,380 shares of common stock of International Controls Corp. held of record by defendant Vesco & Co.;

(ii) 122,463 shares of common stock of International Controls Corp. held of record by defendant Robert L. Vesco;

(iii) Common stock of defendant Fairfield General Corporation owned or controlled by defendants Robert L. Vesco and Vesco & Co.;

(iv) capital stock of defendant Fairfield Aviation Corporation, a wholly-owned subsidiary of defendant Fairfield General Corporation;

(v) capital stock of defendant Skyways Leasing Corporation, a wholly-owned subsidiary of defendant Fairfield Aviation Corporation;

(vi) a Boeing 707 (registered number N11RV) title to which is in defendant Skyways Leasing Corporation, or the proceeds of the sale of the Boeing 707 if it has already been sold or any other moneys or assets of defendants Fairfield General Corporation, Fairfield Aviation Corporation or Skyways Leasing Corporation: and

(vii) any and all other assets or property of such companies.

and by Order to Show Cause dated June 22, 1973 for an order enjoining; pedente lite, defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting concert with it, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc. v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3448-72, pending in the Superior Court of New Jersey Chancery Division, Bergen County, pending final determination of the within action.

AND defendant Vesco & Co., Inc. having moved this Court by Notice of Motion dated June 29, 1973 for an order dismissing the complaint and all proceedings in the within action as to said defendant for lack of jurisdiction, insufficiency of service of process and insufficiency of the complaint;

AND defendants Fairfield General Corporation, Fairfield Aviation Corporation and Skyways Leasing Corporation having moved this Court orally (and by memorandum of law in support thereof) for an order dismissing the complaint and all proceedings against them in the within action for lack of jurisdiction, insufficiency of service of process and insufficiency of the complaint;

AND defendant Alwyn Eisenhauer, having moved this Court by Notice of Motion (undated) for an order quashing service upon said defendant in the within action;

NOW, upon reading the affidavits of David M. Butowsky, sworn to June 7, June 18 and June 22, 1973, of Allen M. Shinn, sworn to June 6, 1973, of Laurence Richardson, Jr., sworn to June 7, 1973 and Malcolm McAlpin, sworn to June 7, 1973 in support of plaintiff's motions and the affidavit of Joel M. Grady, sworn to June 26, 1973 in opposition to plaintiff's motion; the affidavit of Milton H. Stern sworn to June 12, 1973 in support of Vesco & Co., Inc.'s motion; and the affidavit of Howard A. Singer, sworn to

June 1973 in support of defendant Eisenhauer's motion; and said motions having been heard on June 27, 1973 before the Hon. Charles E. Stewart, and upon the opinion of the Court dated , 1973, it is hereby

ORDERED, that defendants Fairfield General Corporation, Fairfield Aviation Corporation and Skyways Leasing Corporation, their directors, officers, agents, servants, employees and attorneys and those acting in concert with them are enjoined, pendente lite, from prosecuting or taking any steps in furtherance of (i) an action entitled "Fairfield General Corporation, a New Jersey corporation, and Skyways Leasing Corporation, a New Jersey corporation, Plaintiffs, v. International Controls Corporation, a corporation of the State of Florida, Defendant" pending in the Superior Court of New Jersey, Chancery Division, Essex County, and (ii) an action entitled "Skyways Leasing Corporation, a New Jersey corporation v. International Controls Corporation, a Florida corporation," Docket No. L-28210-73, pending in the Superior Court of New Jersey, Law Division, Essex County, pending final determination of the within action, and it is further

ORDERED, that defendants Skyways Leasing Corporation, Fairfield General Corporation, Fairfield Aviation Corporation, Frank G. Beatty, Joel Grady and Alwyn Eisenhauer are enjoined, pendente lite, from directly or indirectly, using, selling, encumbering, transferring or otherwise disposing of the following properties without the approval of the Court:

(i) capital stock of defendant Fairfield Aviation Corporation, a wholly owned subsidiary of defendant Fairfield General Coropration;

(ii) capital stock of defendant Skyways Leasing Corporation, a wholly owned subsidiary of defendant Fairfield Aviation Corporation;

(iii) a Boeing 707 (registered number N11RV) title to which is in defendant Skyways Leasing Corporation, or the proceeds of the sale of the Boeing 707 if it has already been sold, or any other moneys or assets of defendants Fairfield General Corporation, Fairfield Aviation Corporation or Skyways Leasing Corporation;

and it is further

ORDERED, that defendants Robert Vesco and Vesco & Co., Inc. are enjoined, pendente lite, from directly or indirectly using, selling, encumbering, transferring or otherwise disposing of:

(i) 846,380 shares of common stock of International Controls Corp. held of record by defendant Vesco & Co.;

(ii) 122,463 shares of common stock of International Controls Corp. held of record by defendant Robert L. Vesco;

(iii) common stock of defendant Fairfield General Corporation owned or controlled by defendants Robert L. Vesco and Vesco & Co.;

and it is further

ORDERED, that defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting in concert with it, are enjoined, pendente lite, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc. v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3488-72, pending in the Superior Court of New Jersey, Chancery Division, Bergen County, pending final determination of the within action; and it is further

ORDERED, that the motions of defendant Vesco & Co., Inc., Fairfield General Corporation, Fairfield Aviation Cor-

poration and Skyways Leasing Corporation to dismiss the complaint and all proceedings in the within action, be, and the same hereby are denied in all respects; and it is further

ORDERED, that the motion of defendant Alwyn Eisenhauer to quash service in the within action be, and the same hereby is denied in all respects.

Dated: New York, New York
July 3, 1973

/s/ Charles E. Stewart
CHARLES E. STEWART
U.S.D.J.

Order of the United States District Court for the Southern District of New York, dated July 3, 1973 (copy containing Judge Stewart's handwritten additions received by Mail on July 9, 1973, from respondent's counsel)
(Filed July 5, 1973)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 CIV. 2518 (CES)

INTERNATIONAL CONTROLS CORP.,
Plaintiff,

-against-

ROBERT L. VESCO, et al.,
Defendants.

Plaintiff International Controls Corp., having moved this Court by Order to Show Cause dated June 8, 1973 for an order:

1. Enjoining, pendente lite, defendants Fairfield General Corporation, Fairfield Aviation Corporation and Skyways Leasing Corporation, their directors, officers, agents, servants, employees and attorneys and those acting in concert with them, from prosecuting or taking any steps in furtherance of (i) an action entitled "Fairfield General Corporation, a New Jersey corporation, Fairfield Aviation Corporation, a New Jersey corporation, and Skyways Leasing Corporation, a New Jersey corporation, plaintiffs, v. International Controls Corporation, a corporation of the State of Florida, defendant" pending in the Superior Court of New Jersey Chancery Division, Essex County, and (ii) an action entitled "Skyways Leasing Corporation, a New Jersey corporation v. International Controls Corporation, a

Florida corporation," Docket No. L-28210-73, pending in the Superior Court of New Jersey, Law Division, Essex County, pending final determination of International Controls Corp. v. Robert L. Vesco, et al; and

2. Enjoining, pendente lite, defendants Robert L. Vesco, Vesco & Co., Skyways Leasing Corporation, Fairfield General Coropration, Fairfield Aviation Corporation, Frank G. Beatty, Joel Grady and Alwyn Eisenhauer, from, directly or indirectly, using, selling, encumbering or otherwise disposing of the following properties without the approval of the Court:

(i) 846,380 shares of common stock of International Controls Corp. held of record by defendant Vesco & Co.;

(ii) 122,463, shares of common stock of International Controls Corp. held of record by defendant Robert L. Vesco;

(iii) common stock of defendant Fairfield General Corporation owned or controlled by defendant Robert L. Vesco and Vesco & Co.;

(iv) capital stock of defendant Fairfield Aviation Corporation, a wholly-owned subsidiary of defendant Fairfield General Corporation;

(v) capital stock of defendant Skyways Leasing Corporation, a wholly-owned subsidiary of defendant Fairfield Aviation Corporation;

(vi) a Boeing 707 (registered number N11RV) title to which is in defendant Skyways Leasing Corporation, or the proceeds of the sale of the Boeing 707 if it has already been sold, or any other moneys or assets of defendants Fairfield General Corporation, Fairfield Aviation Corporation or Skyways Leasing Corporation; and

(vii) any and all other assets or property of such companies.

and by Order to Show Cause dated June 22, 1973 for an order enjoining, pendente lite, defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting concert with it, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc. v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3448-72, pending in the Superior Court of New Jersey Chancery Division, Bergen County, pending final determination of the within action.

AND defendant Vesco & Co., Inc. having moved this Court by Notice of Motion dated June 29, 1973 for an order dismissing the complaint and all proceedings in the within action as to said defendant for lack of jurisdiction, insufficiency of service of process and insufficiency of the complaint;

AND defendants Fairfield General Corporation, Fairfield Aviation Corporation and Skyways Leasing Corporation having moved this Court orally (and by memorandum of law in support thereof) for an order dismissing the complaint and all proceedings against them in the within action for lack of jurisdiction, insufficiency of service of process and insufficiency of the complaint;

AND defendant Alwyn Eisenhauer, having moved this Court by Notice of Motion (undated) for an order quashing service upon said defendant in the within action;

NOW, upon reading the affidavits of David M. Butowsky, sworn to June 7, June 18 and June 22, 1973, of Allen M. Shinn, sworn to June 6, 1973, of Laurence Richardson, Jr., sworn to June 7, 1973 and Malcolm McAlpin, sworn to June 7, 1973 in support of plaintiff's motions and the

affidavit of Milton H. Stern sworn to June 12, 1973 in support of Vesco & Co., Inc.'s motion; and the affidavit of Howard A. Singer, sworn to June 22, 1973 in support of defendant Eisenhauer's motion; and said motions having been heard on June 27, 1973 before the Hon. Charles E. Stewart, and upon the *attached proposed findings of fact and conclusions of law dated July 2, 1973, adopted by the Court and incorporated in this order,** it is hereby

ORDERED, that defendants Fairfield General Corporation, Fairfield Aviation Corporation and Skyways Leasing Corporation, their directors, officers, agents, servants, employees and attorneys and those acting in concert with them are enjoined, pendente lite, from prosecuting or taking any steps in furtherance of (i) an action entitled "Fairfield General Corporation, a New Jersey corporation, and Skyways Leasing Corporation, a New Jersey corporation, Plaintiffs, v. International Controls Corporation, a corporation of the state of Florida, Defendant" pending in the Superior Court of New Jersey, Chancery Division, Essex County, and (ii) an action entitled "Skyways Leasing Corporation, a New Jersey corporation v. International Controls Corporation, a Florida corporation," Docket No. L-28210-73, pending in the Superior Court of New Jersey, Law Division, Essex County, pending final determination of the within action, and it is further

ORDERED, that defendants Skyways Leasing Corporation, Fairfield General Corporation, Fairfield Aviation Corporation, Frank G. Beatty, Joel Grady and Alwyn Eisenhauer are enjoined, pendente lite, from directly or indirectly, using, selling, encumbering, transferring or otherwise disposing of the following properties without the approval of the Court:

(i) capital stock of defendant Fairfield Aviation Corporation, a wholly owned subsidiary of defendant Fairfield General Corporation;

* Italics indicate Judge Stewart's handwritten additions.

(ii) capital stock of defendant Skyways Leasing Corporation, a wholly owned subsidiary of defendant Fairfield Aviation Corporation;

(iii) a Boeing 707 (registered number N11RV) title to which is in defendant Skyways Leasing Corporation, or the proceeds of the sale of the Boeing 707 if it has already been sold, or any other moneys or assets of defendants Fairfield General Corporation, Fairfield Aviation Corporation or Skyways Leasing Corporation;
and it is further

ORDERED, that defendants Robert Vesco and Vesco & Co., Inc. are enjoined, pendente lite, from directly or indirectly using, selling, encumbering, transferring or otherwise disposing of:

(i) 846,380 shares of common stock of International Controls Corp. held of record by defendant Vesco & Co.;

(ii) 122,463 shares of common stock of International Controls Corp. held of record by defendant Robert L. Vesco;

(iii) common stock of defendant Fairfield General Corporation owned or controlled by defendants Robert L. Vesco and Vesco & Co.;

and it is further

ORDERED, that defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting in concert with it, are enjoined, pendente lite, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc. v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3488-72, pending in the Superior Court of New Jersey, Chancery Division, Bergen County, pending final determination of the within action; and it is further

ORDERED, that the motions of defendant Vesco & Co., Inc., Fairfield General Corporation, Fairfield Aviation Corporation and Skyways Leasing Corporation to dismiss the complaint and all proceedings in the within action, be, and the same hereby are denied in all respects; and it is further

ORDERED, that the motion of defendant Alwyn Eisenhauer to quash service in the within action be, and the same hereby is denied in all respects.

Dated: New York, New York
July 3, 1973

/s/ Charles E. Stewart
CHARLES E. STEWART
U.S.D.J.

Order of the United States District Court for the Southern District of New York, dated July 3, 1973 (copy obtained from Clerk of District Court on July 5, 1973)
(Filed July 5, 1973)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 CIV. 5001 (CES)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

-against-

ROBERT L. VESCO, NORMAN LeBLANC, MILTON F. MEISSNER, ULRICH J. STRICKLER, STANLEY GRAZE, FRANK G. BEATTY, RICHARD E. CLAY, WILBERT J. SNIPES, JAMES ROOSEVELT, FREDERIC J. WEYMAR, GILBERT R. J. STRAUB, C. HENRY BUHL, III, ALLAN C. BUTLER, LAURENCE B. RICHARDSON, JOHN D. SCHUYLER, EDWARD STOLTENBERG, HOWARD F. CERNY, GEORGES PHILLIPE, ALLAN F. CONWILL, RAYMOND W. MERITT, JOHN S. D'ALIMONTE, IOS LTD., INTERNATIONAL CONTROLS CORP., BAHAMAS COMMONWEALTH BANK, LTD., OVERSEAS DEVELOPMENT BANK LUXEMBOURG, S.A., INTERNATIONAL BANKCORP. LTD., VALUE CAPITAL LTD., BUTLERS BANK LTD., TRANSGLOBAL FINANCIAL LTD., I.I.T. MANAGEMENT CO., S. A., F.O.F. MANAGEMENT CO., LTD., VENTURE MANAGEMENT CO., LTD., TRANSGLOBAL GROWTH FUND MANAGEMENT CO., LTD., BANK CANTRADE, LTD., VENTURE FUND (INTERNATIONAL), N.V., FUND OF FUNDS, LTD., TRANSGLOBAL GROWTH FUND, LTD., IIT, AN INTERNATIONAL INVESTMENT TRUST, CONSULENTIA VERWALTUNGS, A.G.,
Defendants.

Defendant International Controls Corp., having moved this Court by Order to Show Cause dated June 22, 1973 for an order pursuant to 28 U.S.C. §2283 enjoining, pen-

dente lite, defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting in concert with it, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc. v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3448-72, pending in the Superior Court of New Jersey Chancery Division, Bergen County, pending final determination of International Controls Corp. v. Robert L. Vesco, et al.;

NOW, upon reading the affidavit of David M. Butowsky sworn to June 22, 1973; and said motion having been heard on June 27, 1973 before the Hon. Charles E. Stewart, and upon the opinion of the Court dated July 3, 1973, it is hereby

ORDERED, that defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting in concert with it, are enjoined, pendente lite, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc., v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3488-72, pending in the Superior Court of New Jersey Chancery Division, Bergen County, pending final determination of the action entitled International Controls Corp. v. Robert L. Vesco, et al. (73 Civ. 2518-CES).

Dated: New York, New York
July 3, 1973

/s/ Charles E. Stewart
CHARLES E. STEWART
U.S.D.J.

Order of the United States District Court for the Southern District of New York, dated July 3, 1973 (copy containing Judge Stewart's handwritten additions received by Mail on July 9, 1973, from respondent's counsel) (Filed July 5, 1973)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5001 (CES)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

ROBERT L. VESCO, NORMAN LeBLANC, MILTON F. MEISSNER, ULRICH J. STRICKLER, STANLEY GRAZE, FRANK G. BEATTY, RICHARD E. CLAY, WILBERT J. SNIPES, JAMES ROOSEVELT, FREDERIC J. WEYMAR, GILBERT R. J. STRAUB, C. HENRY BUHL, III, ALLAN C. BUTLER, LAURENCE B. RICHARDSON, JOHN D. SCHUYLER, EDWARD STOLTENBERG, HOWARD F. CERNY, GEORGES PHILLIPE, ALLAN F. CONWILL, RAYMOND W. MERITT, JOHN S. D'ALIMONTE, IOS LTD., INTERNATIONAL CONTROLS CORP., BAHAMAS COMMONWEALTH BANK, LTD., OVERSEAS DEVELOPMENT BANK LUXEMBOURG, S.A., INTERNATIONAL BANKCORP. LTD., VALUE CAPITAL LTD., BUTLERS BANK LTD., TRANSGLOBAL FINANCIAL LTD., I.I.T. MANAGEMENT CO., S. A., F.O.F. MANAGEMENT CO., LTD., VENTURE MANAGEMENT CO., LTD., TRANSGLOBAL GROWTH FUND MANAGEMENT CO., LTD., BANK CANTRADE, LTD., VENTURE FUND (INTERNATIONAL), N.V., FUND OF FUNDS, LTD., TRANSGLOBAL GROWTH FUND, LTD., IIT, AN INTERNATIONAL INVESTMENT TRUST, CONSULENTIA VERWALTUNGS, A.G.,

Defendants.

Defendant International Controls Corp., having moved this Court by Order to Show Cause dated June 22, 1973

for an order pursuant to 28 U.S.C. §2283 enjoining, pendente lite, defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting in concert with it, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc. v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3448-72, pending in the Superior Court of New Jersey Chancery Division, Bergen County, pending final determination of International Controls Corp. v. Robert L. Vesco, et al.;

NOW, upon reading the affidavit of David M. Butowsky sworn to June 22, 1973; and said motion having been heard on June 27, 1973 before the Hon. Charles E. Stewart, and *upon the attached proposed findings of fact and conclusions of law dated July 2, 1973, adopted by the Court and incorporated in this order,** it is hereby

ORDERED, that defendant Vesco & Co., Inc., its directors, officers, agents, servants, employees and attorneys and those acting in concert with it, are enjoined, pendente lite, from prosecuting or taking any steps in furtherance of an action entitled "Vesco & Co., Inc. v. Lawrence B. Richardson, Jr., et al.," Docket No. C-3488-72, pending in the Superior Court of New Jersey Chancery Division, Bergen County, pending final determination of the action entitled International Controls Corp. v. Robert L. Vesco, et al. (73 Civ. 2518-CES).

Dated: New York, New York
July 3, 1973

/s/ Charles E. Stewart
CHARLES E. STEWART
U.S.D.J.

* Italics indicate Judge Stewart's handwritten additions.

Plaintiff-Respondent's Proposed Findings of Fact and
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2518

Conclusions of Law Submitted to District Court on or about July 2, 1973

UNITED STATES DISTRICT COURT

INTERNATIONAL CONTROLS CORP.,
Plaintiff,

-against-

ROBERT L. VESCO, et al.,
Defendants.

Plaintiff International Controls Corp. ("ICC"), by its attorneys David M. Butowsky and Shea Gould Climenko & Kramer respectfully submits proposed findings of fact and conclusions of law in connection with the following motions submitted to the Court, on June 27, 1973:

1. ICC's motion for a preliminary injunction restraining the transfer of certain assets by defendants Fairfield General Corporation, Fairfield Aviation Corporation, Skyways Leasing Corporation, Robert L. Vesco, Vesco & Co., Inc., Frank G. Beatty, Joel Grady and Alwyn Eisenhauer.

2. ICC's motion to preliminarily enjoin the prosecution by certain of the defendants of two actions in the State of New Jersey entitled "Fairfield General Corporation v. International Controls Corp." (N.J. Sup. Ct., Chan. Div., Essex Co.) and "Skyways Leasing Corporation v. International Controls Corp.," (N.J. Sup. Ct., Law Div., Essex Co.).

3. ICC's motion to preliminarily enjoin prosecution of the action entitled "Vesco & Co., Inc. v. Laurence B. Richardson, et al.," (N.J. Sup. Ct., Chan. Div. Bergen Co.).

4. Motion of defendant Vesco & Co., Inc. for dismissal of the Complaint for lack of subject matter jurisdiction, lack of personal jurisdiction and insufficiency of service of process.

5. Motion of defendant Alwyn Eisenhauer to dismiss the Complaint for lack of subject matter jurisdiction, personal jurisdiction and insufficiency of service of process.

FINDINGS OF FACT

The SEC Action and Entry of Permanent Injunction

1. In November 1972, the Securities and Exchange Commission instituted the action entitled SEC v. Robert L. Vesco, et al., 72 Civ. 5001 (CES) ("SEC action"). In that proceeding, application was made to have a receiver appointed for ICC. The said application, as well as the claim by the SEC against ICC, was resolved by a Final Judgment of Permanent Injunction and Appointment of Special Counsel and Directors dated March 16, 1973 ("Final Judgment") in which this Court appointed Special Counsel and a new interim independent Board of Directors for ICC. The Final Judgment directed Special Counsel to conduct a full investigation into the affairs of ICC, report to this Court and the Securities and Exchange Commission (the "SEC") and take all appropriate action, including, but not limited to, the institution and prosecution of suits on behalf of ICC to recover all assets or monies improperly used, taken, wasted, misappropriated or paid to anyone without appropriate authorization of the Board of Directors of ICC, or in breach of duties owed to ICC. The judgment further provided that:

> ". . . pending the investigation and accounting by the Special Counsel, he shall take immediate, necessary or

appropriate action to protect International Controls' claims, interests and rights and pursue all possible claims against the defendants herein or any other persons including, but not limited to, the commencement of legal proceedings to prevent the dissipation or flight of any funds or other assets, the placing of a stop transfer order on securities beneficially owned or controlled by said defendants and/or the institution of appropriate action to freeze and preserve the assets of said defendants or others who may be obligated to International Controls. . ."

By an Order of this Court dated March 25, 1973 George D. Gould, Charles S. Desmond, John Mosler, Allen M. Shinn and Joseph Weiner were named as interim directors of ICC and David M. Butowsky as Special Counsel.

Facts Surrounding Commencement of Instant Action and Request for Injunctive Relief

2. The instant action, instituted on June 7, 1973, appears to be a direct result of the above referred to directions to Special Counsel and charges defendants with violations of various provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq., ("the 1934 Act") and the rules and regulations promulgated thereunder.

3. Special Counsel claims to have found that:

(a) Defendant Robert L. Vesco ("Vesco") and his group had engaged in an unlawful scheme involving the purchase and sale of securities to use ICC to obtain for themselves the benefit and control of I. O. S. Ltd. ("I.O.S.") and related companies, and other assets of ICC, including the stock of Fairfield General Corporation ("Fairfield General"), and its subsidiaries, Fairfield Aviation Corporation

("Fairfield Aviation") and Skyways Leasing Corporation ("Skyways"), whose sole business is the ownership and operation of a Boeing 707, Register Number N11RV.

(b) The prinicipal architect of that scheme, defendant Vesco, had failed to appear to plead to a criminal indictment in New York and was a fugitive from justice, living outside of the United States to avoid the jurisdiction of the Courts.

(c) The principal asset of Fairfield General, Fairfield Aviation and Skyways, the Boeing 707, has been removed from the United States, and attempts are being made to effectuate its sale. Once converted to cash, this asset could quickly disappear.

(d) The only other known asset of defendant Vesco that could be available to satisfy a judgment is his stockholdings in ICC and most of that has been transferred to his corporation, defendant Vesco & Co., Inc. ("Vesco & Co.").

The Fraudulent Scheme Alleged

4. ICC is a publicly held Florida corporation whose common stock and warrants were listed on the American Stock Exchange. Defendant Vesco was an officer, director and controlling stockholder of ICC holding approximately 25% of ICC's stock. Prior to January 1, 1971, plaintiff's business consisted in part of the ownership and operation of Fairfield Aviation, a New Jersey corporation and then a wholly-owned subsidiary. Fairfield Aviation in turn wholly-owned Skyways, also a New Jersey corporation.

5. It appears from the complaint and the affidavits submitted in support of plaintiff's motion that sometime during 1971 defendant Vesco formulated a plan by which he would cause ICC to acquire and pay the expenses for a Boeing 707 airplane which would be used as his personal trans-

portation vehicle, and for business largely unrelated to the business of ICC, and pursuant to that plan would cause ICC to transfer said airplane, together with other assets of substantial value, to a corporation controlled and dominated by him, thereby permitting him to have all the enjoyment of ownership of the airplane at the expense of ICC, that defendant Grady, Beatty, Clay and Dodd, who were all officer-director fiduciaries of ICC and/or its wholly-owned subsidiaries (Fairfield General, Fairfield Aviation and Skyways), joined with Vesco in formulating and carrying out that plan, and that Beatty was and is the chief executive officer of defendant Skyways.

6. It further appears that pursuant to said plan, the following steps were taken:

(a) On December 23, 1970, Vesco caused ICC to contribute to Skyways certain aircraft assets (not the Boeing 707) having an aggregate market value of $363,000.

(b) On June 15, 1971, Vesco caused Skyways to purchase the Boeing 707 from Pan American Airways for $1,375,000, of which $343,750 was paid with funds contributed to Skyways by ICC and the balance owed to the seller in twenty quarterly installments.

(c) Between June 1971 and December 8, 1971, Vesco caused ICC to advance approximately $1,000,000 toward the cost of acquiring the Boeing 707 and the refurbishment and improvement of that plane. During the three months ended September 30, 1971, Skyways leased the plane to ICC at a total cost of $439,000. By lease dated as of October 1, 1971, ICC agreed to lease the plane from Skyways for a period of five years at an approximate gross rental of $3,500,000, the larger portions of which were to be paid as monthly rental during the first two years of the lease ($100,000 a month for the first three months, $83,000 per

month for the next twelve months). Under the terms of the lease (i) ICC was responsible for service, maintenance, overhaul scheduling and personnel; (ii) Skyways had the absolute right to terminate the lease any time it wished to sell or transfer ownership of the plane; and (iii) all improvements to the plane paid for by ICC became the property of Skyways.

(d) The "refurbishing" of the airplane was such as to make it suitable only as an entertainment and transportation center for Mr. Vesco personally. Its seating capacity was reduced from 150 passengers to approximately 33; entertainment facilities such as a discotheque, dance floor, hi-fi stereo, sauna and other amenities were installed.

(e) In November 1971, as part of the aforesaid plan, defendant Vesco caused still another corporation to be organized. This corporation was Fairfield General. It had no assets. At an ICC Board of Directors meeting held December 8, 1971, the ICC Board of Directors adopted resolutions purporting to accomplish the following:

(i) Transfer of all of the stock of Fairfield Aviation owned by ICC to the newly organized Fairfield General. This transfer was made in exchange for stock of the newly organized Fairfield General.

(ii) Declare a purported dividend by ICC to its own stockholders (of which Robert L. Vesco personally owned 25%) of the stock of Fairfield General. This "dividend was accompanied by a 1933 Act registration and prospectus which accomplished an instantaneous "spin-off" launching Fairfield General as a separately publicly held and traded corporation.

By the foregoing means ICC was divested of its ownership and control over Fairfield Aviation, its aviation business, Skyways and the Boeing 707. A new corporate com-

plex was created wholly apart from ICC in which all of the Fairfield Aviation assets, including the Boeing 707, were held. The said complex was controlled by Vesco through his 25% ownership of its stock and the installation of a Board of Directors of his choosing prior to the spin-off, consisting of his co-conspirator defendants Grady, Clay, Dodd and Beatty. This new corporate complex was now the beneficiary of the funds expended by ICC for the acquisition and improvement of the Boeing 707 and was the lessor under the lease, a lease under which ICC had spent and would spend hundreds of thousands of dollars as escalated rentals during the early months and to pay for the improvements to the Boeing 707, but which provided that if the plane were sold or transferred, ICC's rights as lessee could be terminated on five days notice and would forfeit all of the expenditures it had made for improvements.

(f) Two former directors Laurence Richardson, Jr. and Malcolm McAlpin have given sworn statements in this Court that their consent to the aforesaid exchange and "dividend" was secured by misstatements of fact and omissions of material statements of facts. Principal among these are that:

(i) They were not told the truth about the amount spent on refurbishing the plane, or about the sumptuous nature and extent of the renovations.

(ii) They were not told the onerous terms of the lease to Skyways.

(iii) They were told that the plane would be used and paid for by I.O.S. and would not be an expense to ICC, or used by Mr. Vesco for his personal transportation.

(g) At the time of the distribution of the Fairfield General shares as a dividend to the stockholders, there was issued and delivered a prospectus under the Securities Act

of 1933. It appears from affidavits submitted on this motion and from the prospectus itself that said prospectus contained a number of false and misleading statements, among which were the following:

(i) It stated that the cost of refurbishing the plane was $350,000 when, in fact, it was more than $600,000.

(ii) It concealed the fact that the improvements to the Boeing 707 were designed to the satisfaction and personal taste of Robert L. Vesco, would in effect transform the plane into a pleasure palace for him and render it thereafter commercially useless.

(iii) It failed to disclose that the $1,000,000 spent in the acquisition and refurbishing of the plane had been expended without authorization of ICC's Board of Directors until the purported "ratification" of December 8, 1971 by which time it was a fait accompli.

(iv) It failed to set forth the termination and modification provisions of the lease with Skyways referred to above.

(v) It stated that the reason for the dividend was that "the General Aviation business did not fit into the operations of any of the reconstituted subsidiaries [of ICC]," when the real reason was to place the aviation assets under the absolute control of defendant Robert L. Vesco so that he could have the Boeing 707 for his personal use.

(h) The dividend of Fairfield General shares resulted in a spin-off of much more than $1,000,000 of ICC's former assets without putting any true value into the hands of the stockholders who received it (other than Vesco). The stock itself had little inherent value. The principal business of the corporation was its lease with ICC and the principal use of the plane was to fly Vesco from place to place in luxury. The stock had an insubstantial market

value and, unlike ICC stock, the stock of Fairfield General was not listed on any exchange.

(i) During 1971 and 1972 (and apparently up to the present), the Boeing 707 was used by Mr. Vesco and members of his family for trips to different places around the world. Most of the destinations are serviced by commercial airlines. The 707 is too large to land in small airports not so serviced.

7. The facts recited in "5" and "6" above are not controverted by the papers submitted in opposition to the instant motions.

8. The exchange of shares between ICC and defendant Fairfield General in which ICC parted with its stock in Fairfield Aviation (and with it the stock and assets of Skyways) and received in turn from Fairfield General stock in Fairfield General was a transaction in securities within the meaning of Section 10(b) of the 1934 Act in that it was allegedly authorized and entered into as part of a scheme in violation of the 1934 Act in which it was contemplated that the Fairfield General securities would be spun-off as a dividend through ICC stockholders to the public with the use of a 1933 Act prospectus.

9. Fairfield General, Fairfield Aviation and Skyways were major participants in the scheme alleged in that they were the very instruments by which ICC was looted of assets. Defendant Fairfield General, a corporation whose Board of Directors consisted of defendants Grady, Clay, Dodd and Beatty, received, and still holds, the very assets lost by ICC in the transaction, viz., the stock of Fairfield Aviation and through it the stock of Skyways. Defendants Fairfield Aviation and Skyways are mere corporate conduits through which Fairfield General holds these assets. They are necessary parties in order for this Court to afford relief against Fairfield General.

Defendant Vesco & Co.

10. The complaint alleges that Vesco and his children transferred certain assets to Vesco & Co. From papers submitted in support of Vesco & Co.'s motion to dismiss, it appears that in July, 1972 (a time when he was under intensive SEC investigation), Vesco caused to be created defendant Vesco & Co., a Delaware corporation, and contributed 800,000 shares of ICC common stock to said corporation. The basic activity of Vesco & Co. consists of the ownership of Vesco's ICC stock. Robert Vesco is the owner of the preferred shares of Vesco & Co. His wife, Patricia J. Vesco, as custodian for their children, is the owner of all of the voting and non-voting common stock of that company. The ICC stock placed in Vesco & Co. by Vesco may be the only property from which a judgment against him may be satisfied.

11. On the papers before the Court it appears that Vesco & Co. is a corporate alter ego for defendant Robert Vesco and was created by him during and after the perpetration of the fraud charged in the complaint. Defendant Vesco was a defendant in the action brought by the SEC and this Court had personal jurisdiction over him in that action. He did not object to the entry of the Final Judgment against ICC and has made no attempt to modify or vacate said judgment. Rather, he has attempted to attack said Final Judgment in the New Jersey courts through Vesco & Co.

Defendant Eisenhauer

12. Defendant Alwyn Eisenhauer is the principal pilot of the 707 and the personal pilot of Robert Vesco. The complaint charges Mr. Eisenhauer with aiding and abetting all of the violations alleged therein. Service of the sum-

mons and complaint upon Mr. Eisenhauer was made by the U.S. Marshal in New Jersey on June 19, 1973,

13. On March 7, 1973, plaintiff ICC had entered into an agreement with defendant Eisenhauer pursuant to which defendant Eisenhauer agreed to fly the Boeing 707 at ICC's request for all flights which ICC deemed necessary while the Boeing 707 is leased to and under the control of ICC. Pursuant thereto, plaintiff ICC instructed defendant Eisenhauer to fly the Boeing 707 to Newark and paid defendant Eisenhauer expense money to do so. Defendants Grady and Beatty wrongfully instructed defendant Eisenhauer to fly the Boeing 707 to Beirut and thence to Nassau, and defendant Eisenhauer complied. This was done secretly and without prior notice to ICC despite the fact that negotiations were then being conducted between defendants Grady, Beatty and counsel to ICC.

Necessity for Injunctive Relief
Restraining Transfer of Assets

14. Defendants Beatty and Grady have informed counsel to ICC that Skyways was attempting to sell the Boeing 707. Attempts to sell the Boeing 707 have continued to the present time. Unless this Court acts to freeze the assets involved, vis., the stock of Fairfield Aviation held by Fairfield General and the assets of Fairfield Aviation including the stock of Skyways Leasing and the Boeing 707 and defendant Vesco's stock in ICC there is a grave danger that said assets will be removed from the jurisdiction of the Court or otherwise disposed of and, therefore, there will be no assets available to give meaningful compliance to any order or judgment of the Court in enforcing the Securities Exchange Act of 1934 or for satisfaction of any money judgment recovered. In addition, it appears necessary to enjoin the transfer of the ICC stock held by Vesco & Co. in order

to prevent Vesco from perpetrating further frauds by use of his ownership of what has heretofore been a controlling 25% interest in ICC.

15. Fairfield General and its subsidiaries have no assets or business except those received from ICC. They are not meaningful business entities whose day-to-day affairs would be interrupted by the injunction sought. They are merely corporate repositories of the proceeds of the transaction with ICC which is the subject of the complaint herein.

16. Vesco & Co. is a corporation created by Mr. Vesco which is owned by him, his wife and their children. It is supposedly managed and controlled by his wife and his secretary. Vesco has deposited into this shell the largest portion of his shares of ICC. Vesco & Co. is not a meaningful business entity whose day-to-day affairs would be interrupted by the injunction sought herein.

Necessity for Enjoining
State Court Actions

17. (a) In February 1973, at the demand of the SEC, this Court enjoined ICC from making any further payments pursuant to the lease with Skyways covering the Boeing 707 and no such payments were thereafter made.

(b) The Final Judgment of March 16, 1973 prohibited ICC from holding any annual meeting of stockholders without the consent of the SEC and until its proxy material, including accompanying financial information, is found by the SEC to be in accordance with the Securities Exchange Act of 1934.

18. On or about May 25, 1973, Fairfield General, Fairfield Aviation and Skyways, who appear to be dominated and controlled by Vesco and defendants Beatty, Clay, Dodd and Grady, the directors selected by him, com-

menced an action against ICC seeking to enforce certain air taxi and management agreements made between those companies and ICC at a time when said companies were wholly-owned subsidiaries of ICC and as part of the alleged plan and conspiracy set forth above. On June 5, 1973, Skyways caused an action to be brought in a New Jersey state court seeking to recover over $2,000,000 from ICC claimed to be due under the Boeing 707 lease.

19. To permit Fairfield General, Fairfield Aviation and Skyways to enforce the agreements with ICC—especially the lease covering the Boeing 707—would be in effect to permit said defendants to continue to effectuate and reap the fruits of the alleged violations of the 1934 Act before this Court could finally determine this action on the merits.

20. On June 7, 1973, Vesco & Co. brought a stockholders' action in a New Jersey state court seeking to have the Court-appointed Board of Directors removed and an election of directors held and also asserting derivative claims on ICC's behalf against certain of ICC's former directors.

21. Vesco & Co.'s New Jersey action is a direct attack on this Court's Final Judgment against ICC and, in effect, asks the Courts of New Jersey to invalidate and repeal said Final Judgment. In exercise of this Court's paramount authority under the 1934 Act and at the behest of the SEC acting pursuant to the same statute, this Court appointed Special Counsel and an interim Board of Directors and expressly forbade the holding of a meeting of stockholders for the election of a new board of directors until the SEC had consented to the holding of such a meeting and cleared proxy material in accordance with the Securities Exchange Act of 1934. Vesco & Co.'s New Jersey action if it were to succeed would violate the express provisions of this Court's judgment.

22. The derivative claims asserted in Vesco & Co.'s New Jersey action also conflict with and obstruct the effectuation of this Court's Final Judgment against ICC which was entered in lieu of the appointment of a Receiver. Rather than appointing such a Receiver, this Court appointed Special Counsel to vindicate the rights of ICC against its former directors. Had a Receiver been appointed, this Court would have had the power under 28 U.S.C. §2283 to protect and effectuate its judgment by enjoining stockholder derivative suits which tended to harass or interfere with the Receiver's work. Since the duties of Special Counsel in asserting corporate rights and pursuing corporate remedies against former directors are equivalent to those which would have been imposed on a Receiver, an injunction against conflicting derivative actions brought in the name of ICC by stockholders is as much an appropriate remedy as it would have been had a Receiver been appointed.

CONCLUSIONS OF LAW

A. ICC's motion for a preliminary injunction restraining the transfer of certain assets by defendants Fairfield Aviation, Skyways, Vesco, Vesco & Co., Beatty, Grady and Eisenhauer

1. Plaintiff has demonstrated for purposes of the pending motions that the wrongdoings alleged in the complaint were accomplished by a transaction or transactions within the meaning of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and this Court, therefore, has jurisdiction of this action under Section 27 of the 1934 Act.

2. There is a reasonable expectation that the policy of the 1934 Act will be thwarted unless the preliminary in-

junctive relief requested is granted. Plaintiff has presented a strong prima facie case to justify the discretionary issuance of such relief.

3. The preliminary injunctive relief requested is necessary in order to preserve the status quo pending final determination of this action.

4. Unless the preliminary injunctive relief requested is granted, plaintiff will be irreparably harmed in that any judgment or recovery by plaintiff may be rendered meaningless.

5. Defendants against whom relief is sought have failed to demonstrate any equivalent countervailing harm which would result by the granting of the preliminary injunctive relief requested.

B. ICC's motion to preliminarily enjoin prosecution of New Jersey state court actions commenced by Fairfield General and Skyways

6. Plaintiff has demonstrated for purposes of the pending motions that the wrongdoings alleged in the complaint were accomplished by a transaction or transactions within the meaning of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and this Court, therefore, has jurisdiction of this action under Section 27 of the 1934 Act.

7. The preliminary injunctive relief requested is necessary in order to enjoin the continuation of the frauds and violations of the Securities Exchange Act of 1934 alleged in the complaint and, therefore, is expressly authorized by the said Act and is necssary in aid of the exclusive jurisdiction conferred upon this Court by said Act.

C. ICC's motion to preliminarily enjoin the prosecution of the New Jersey state court actions commenced by Vesco & Co.

8. Plaintiff has demonstrated for purposes of the pending motions that the wrongdoings alleged in the complaint were accomplished by a transaction or transactions within the meaning of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and this Court, therefore, has jurisdiction of this action under Section 27 of the 1934 Act.

9. The action commenced by Vesco & Co. constitutes a collateral attack on the Final Judgment of Permanent Injunction and Appointment of Special Counsel and Directors entered by this Court in the action entitled Securities and Exchange Commission v. Robert L. Vesco, et al., 72 Civ. 5001 (CES) and, therefore, the preliminary injunctive relief requested is necessary in order to protect and effectuate said judgment.

D. Motion by Vesco & Co. for dismissal of the complaint for lack of subject matter jurisdiction and lack of personal jurisdiction

10. The complaint states a claim against Vesco & Co. for violation of the 1934 Act and, therefore, this Court has subject matter jurisdiction with respect to said claims.

11. Proper service having been made upon Vesco & Co., this Court has jurisdiction over its person.

E. Motion by defendant Eisenhauer to dismiss the complaint for lack of subject matter jurisdiction and lack of personal jurisdiction

12. The complaint states a claim against defendant Eisenhauer for violation of the 1934 Act and, therefore,

this Court has subject matter jurisdiction with respect to said claims.

13. Proper service having been made upon defendant Eisenhauer, this Court has jurisdiction over his person.

Dated: New York, New York
July 2, 1973

DAVID M. BUTOWSKY, Esq.
230 Park Avenue
New York, New York
725-5360

SHEA GOULD CLIMENKO
& KRAMER

By: /s/ Climenko
A Member of the Firm
330 Madison Avenue
New York, New York
661-3200
Attorneys for Plaintiff

Plaintiff-Respondent's Proposed Findings of Fact and Conclusions of Law, as Adopted by the District Court on or about July 3, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 CIV. 2518

INTERNATIONAL CONTROLS CORP.,
Plaintiff,

-against-

ROBERT L. VESCO, et al.,
Defendants.

Plaintiff International Controls Corp. ("ICC"), by its attorneys David M. Butowsky and Shea Gould Climenko & Kramer respectfully submits proposed findings of fact and conclusions of law in connection with the following motions submitted to the Court, on June 27, 1973:

1. ICC's motion for a preliminary injunction restraining the transfer of certain assets by defendants Fairfield General Corporation, Fairfield Aviation Corporation, Skyway Leasing Corporation, Robert L. Vesco, Vesco & Co., Inc., Frank G. Beatty, Joel Grady and Alwyn Eisenhauser.

2. ICC's motion to preliminarily enjoin the prosecution by certain of the defendants of two actions in the State of New Jersey entitled "Fairfield General Corporation v. International Controls Corp." (N.J. Sup. Ct., Chan. Div., Essex Co.) and "Skyways Leasing Corporation v. International Controls Corp.," (N.J. Sup. Ct., Law Div., Essex Co.).

3. ICC's motion to preliminarily enjoin prosecution of the action entitled "Vesco & Co., Inc. v. Laurence

B. Richardson, et al.," (N.J. Sup. Ct., Chan. Div. Bergen Co.).

4. Motion of defendant Vesco & Co., Inc. for dismissal of the Complaint for lack of subject matter jurisdiction, lack of personal jurisdiction and insufficiency of service of process.

5. Motion of defendant Alwyn Eisenhauer to dismiss the Complaint for lack of subject matter jurisdiction, personal jurisdiction and insufficiency of service of process.

FINDINGS OF FACT

The SEC Action and Entry of Permanent Injunction

1. In November 1972, the Securities and Exchange Commission instituted the action entitled SEC v. Robert L. Vesco, et al., 72 Civ. 5001 (CES) ("SEC action"). In that proceeding, application was made to have a receiver appointed for ICC. The said application, as well as the claim by the SEC against ICC, was resolved by a Final Judgment of Permanent Injunction and Appointment of Special Counsel and Directors dated March 16, 1973 ("Final Judgment") in which this Court appointed Special Counsel and a new interim independent Board of Directors for ICC. The Final Judgment directed Special Counsel to conduct a full investigation into the affairs of ICC, report to this Court and the Securities and Exchange Commission (the "SEC") and take all appropriate action, including, but not limited to, the institution and prosecution of suits on behalf of ICC to recover all assets or monies improperly used, taken, wasted, misappropriated or paid to anyone without appropriate authorization of the Board of Directors of ICC, or in breach of duties owned to ICC. The judgment further provided that:

"... pending the investigation and accounting by the Special Counsel, he shall take immediate, necessary or appropriate action to protect International Controls' claims, interests and rights and pursue all possible claims against the defendants herein or any other persons including, but not limited to, the commencement of legal proceedings to prevent the dissipation or flight of any funds or other assets, the placing of a stop transfer order on securities beneficially owned or controlled by said defendants and/or the institution of appropriate action to freeze and preserve the assets of said defendants or others who may be obligated to International Controls.

By an Order of this Court dated March 25, 1973 George D. Gould, Charles S. Desmond, John Mosler, Allen M. Shinn and Joseph Weiner were named as interim directors of ICC and David M. Butowsky as Special Counsel.

Facts Surrounding Commencement of Instant Action and Request for Injunctive Relief

2. The instant action, instituted on June 7, 1973, appears to be a direct result of the above referred to directions to Special Counsel and charges defendants with violations of various provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq., ("the 1934 Act") and the rules and regulations promulgated thereunder.

3. Special claims to have found that:

(a) Defendant Robert L. Vesco ("Vesco") and his group had engaged in an unlawful scheme involving the purchase and sale of securities to use ICC to obtain for themselves the benefit and control of I. O. S. Ltd. ("I.O.S.") and related companies, and other

assets of ICC, including the stock of Fairfield General Corporation ("Fairfield General"), and its subsidiaries, Fairfield Aviation Corporation ("Fairfield Aviation") and Skyways Leasing Corporation ("Skyways"), whose sole business is the ownership and operation of a Boeing 707, Register Number N11RV.

(b) The principal architect of that scheme, defendant Vesco, had failed to appear to plead to a criminal indictment in New York and was a fugitive from justice, living outside of the United States to avoid the jurisdiction of the Courts.

(c) The principal asset of Fairfield General, Fairfield Aviation and Skyways, the Boeing 707, has been removed from United States, and attempts are being made to effectuate its sale. Once converted to cash, this asset could quickly disappear.

(d) The only other known asset of defendant Vesco that could be available to satisfy a judgment is his stockholdings in ICC and most of that has been transferred to his corporation, defendant Vesco & Co., Inc. ("Vesco & Co.").

The Fraudulent Scheme Alleged

4. ICC is a publicly held Florida corporation whose common stock and warrants were listed on the American Stock Exchange. Defendant Vesco was an officer, director and controlling stockholder of ICC holding approximately 25% of ICC's stock. Prior to January 1, 1971, plaintiff's business consisted in part of the ownership and operation of Fairfield Aviation, a New Jersey corporation and then a wholly-owned subsidiary. Fairfield Aviation in turn wholly-owned Skyways, also a New Jersey corporation.

5. It appears from the complaint and the affidavits submitted in support of plaintiff's motion that sometime dur-

ing 1971 defendant Vesco formulated a plan by which he would cause ICC to acquire and pay the expenses for a Boeing 707 airplane which would be used as his personal transportation vehicle, and for business largely unrelated to the business of ICC, and pursuant to that plan would cause ICC to transfer said airplane, together with other assets of substantial value, to a corporation controlled and dominated by him, thereby permitting him to have all the enjoyment of ownership of the airplane at the expense of ICC, that defendant Grady, Beatty, Clay and Dodd, who were all officer-director fiduciaries of ICC and/or its wholly-owned subsidiaries (Fairfield General, Fairfield Aviation and Skyways), joined with Vesco in formulating and carrying out that plan, and that Beatty was and is the chief executive officer of defendant Fairfield General and Grady the chief executive officer of defendant Skyways.

6. It further appears that pursuant to said plan, the following steps were taken:

(a) On December 23, 1970, Vesco caused ICC to contribute to Skyways certain aircraft assets (not the Boeing 707) having an aggregate market value of $363,000.

(b) On June 15, 1971, Vesco caused Skyways to purchase the Boeing 707 from Pan American Airways for $1,375,000 of which $343,750 was paid with funds contributed to Skyways by ICC and the balance owed to the seller in twenty quarterly installments.

(c) Between June 1971 and December 8, 1971, Vesco caused ICC to advance approximately $1,000-000 toward the cost of acquiring the Boeing 707 and the refurbishment and improvement of that plane. During the three months ended September 30, 1971, Skyways leased the plane to ICC at a total cost of

$439,000. By lease dated as of October 1, 1971, ICC agreed to lease the plane from Skyways for a period of five years at an approximate gross rental of $3,500,-000, the larger portions of which were to be paid as monthly rental during the first two years of the lease ($100,000 a month for the first three months, $83,000 per month for the next twelve months). Under the terms of the lease (i) ICC was responsible for service, maintenance, overhaul scheduling and personnel; (ii) Skyways had the absolute right to terminate the lease any time it wished to sell or transfer ownership of the plane; and (iii) all improvements to the plane paid for by ICC became the property of Skyways.

(d) The "refurbishing" of the airplane was such as to make it suitable only as an entertainment and transportation center for Mr. Vesco. Its seating capacity was reduced from 150 passengers to approximately 33; entertainment facilities such as a discotheque, dance floor, hi-fi stereo, sauna and other amenities were installed.

(e) In November 1971, as part of the aforesaid plan, defendant Vesco caused still another corporation to be organized. This corporation was Fairfield General. It had no assets. At an ICC Board of Directors meeting held December 8, 1971, the ICC Board of Directors adopted resolutions purporting to accomplish the following:

(i) Transfer of all of the stock of Fairfield Aviation owned by ICC to the newly organized Fairfield General. This transfer was made in exchange for stock of the newly organized Fairfield General.

(ii) Declare a purported dividend by ICC to its own stockholders (of which Robert L. Vesco personally

owned 25%) of the stock of Fairfield General. This "dividend was accompanied by a 1933 Act registration and prospectus which accompanied an instantaneous "spin-off" launching Fairfield General as a separately publicly held and traded corporation.

By the foregoing means ICC was divested of its ownership and control over Fairfield Aviation, its aviation business, Skyways and the Boeing 707. A new corporate complex was created wholly apart from ICC in which all of the Fairfield Aviation assets, including the Boeing 707, were held. The said complex was controlled by Vesco through his 25% ownership of its stock and the installation of a Board of Directors of his choosing prior to the spin-off, consisting of his co-conspirator defendants Grady, Clay, Dodd and Beatty. This new corporate complex was now the beneficiary of the funds expended by ICC for the acquisition and improvement of the Boeing 707 and was the lessor under the lease, a lease under which ICC had spent and would spend hundreds of thousands of dollars as escalated rentals during the early months and to pay for the improvements to the Boeing 707, but which provided that if the plane were sold or transferred, ICC's rights as lessee could be terminated on five days notice and would forfeit all of the expenditures it had made for improvements.

(f) Two former directors Laurence Richardson, Jr. and Malcolm McAlpin have given sworn statements in this Court that their consent to the aforesaid exchange and "dividend" was secured by misstatements of fact and omissions of material statements of facts. Principal among these are that:

(i) They were not told the truth about the amount spent on refurbishing the plane, or about the sumptuous nature and extent of the renovations.

(ii) They were not told the onerous terms of the lease to Skyways.

(iii) They were told that the plane would be used and paid for by I.O.S. and would not be an expense to ICC, or used by Mr. Vesco for his personal transportation.

(g) At the time of the distribution of the Fairfield General shares as a dividend to the stockholders, there was issued and delivered a prospectus under the Securities Act of 1933. Rider A. It appears from affidavits submitted on this motion and from the prospectus itself that the said prospectus contained a number of false and misleading statements, among which were the following:

Rider A

The dividend in kind was paid by The Marine Midland Bank by mailing it from its office in New York. Presumably, the prospectus which accompanied the dividend to the stockholders was mailed from New York.

(i) It stated that the cost of refurbishing the plan was $350,000 when, in fact, it was more than $600,000.

(ii) It concealed the fact that the improvements to the Boeing 707 were designed to the satisfaction and personal taste of Robert L. Vesco, would in effect transform the plane into a pleasure palace for him and render it thereafter commercially useless.

(iii) It failed to disclose that the $1,000,000 spent in the acquisition and refurbishing of the plane had been expended without authorization of ICC's Board of Directors until the purported "ratification" of December 8, 1971 by which time it was a fait accompli.

(iv) It failed to set forth the termination and modification provisions of the lease with Skyways referred to above.

(v) It stated that the reason for the dividend was that "the General Aviation business did not fit into the operations of any of the reconstituted subsidiaries [of ICC]" when the real reason was to place the aviation assets under the absolute control of defendant Robert L. Vesco so that he could have the Boeing 707 for his personal use.

(h) The dividend of Fairfield General shares resulted in a spin-off of much more than $1,000,000 of ICC's former assets without putting any true value into the hands of the stockholders who received it (other than Vesco). The stock itself had little inherent value. The principal business of the corporation was its lease with ICC and the principal use of the plane was to fly Vesco from place to place in luxury. The stock had an insubstantial market value and, unlike ICC stock, the stock of Fairfield General was not listed on any exchange.

(i) During 1971 and 1972 (and apparently up to the present), the Boeing 707 was used by Mr. Vesco and members of his family for trips to different places around the world. Most of the destinations are serviced by commercial airlines. The 707 is too large to land in small airports not so serviced.

7. The facts recited in "5" and "6" above are not controverted by the papers submitted in opposition to the instant motions.

8. The exchange of shares between ICC and defendant Fairfield General in which ICC parted with its stock

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owner of all of the voting and non-voting common stock of that company. The ICC stock placed in Vesco & Co. by Vesco may be the only property from which a judgment against him may be satisfied.

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done secretly and without prior notice to ICC despite the fact that negotiations were then being conducted between defendants Grady, Beatty and counsel to ICC.

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the fruits of the alleged violations of the 1934 Act before this Court could finally determine this action on the merits.

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22. The derivative claims asserted in Vesco & Co.'s New Jersey action also conflict with and obstruct the effectuation of this Court's Final Judgment against ICC which was entered in lieu of the appointment of a Receiver. Rather than appointing such a Receiver, this Court appointed Special Counsel to vindicate the rights of ICC against its former directors. Had a Receiver been appointed, this Court would have had the power under 28 U.S. C. §2283 to protect and effectuate its judgment by enjoining stockholder derivative suits which tended to harass or interfere with the Receiver's work. Since the duties of Special Counsel in asserting corporate rights and pursuing corporate remedies against former directors are equivalent to

those which would have been imposed on a Receiver, an injunction against conflicting derivative actions brought in the name of ICC by stockholders is as much an appropriate remedy as it would have been had a Receiver been appointed.

CONCLUSIONS OF LAW

A. ICC's motion for a preliminary injunction restraining the transfer of certain assets by defendants Fairfield General, Fairfield Aviation, Skyways, Vesco, Vesco & Co., Beatty, Grady and Eisenhauer

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2. There is a reasonable expectation that the policy of the 1934 Act will be thwarted unless the preliminary injunctive relief requested is granted. Plaintiff has presented a strong prima facie case to justify the discretionary issuance of such relief.

3. The preliminary injunctive relief requested is necessary in order to preserve the status quo pending final determination of this action.

4. Unless the preliminary injunctive relief requested is granted, plaintiff will be irreparably harmed in that any judgment or recovery by plaintiff may be rendered meaningless.

5. Defendants against whom relief is sought have failed to demonstrate any equivalent contervailing harm which

would result by the granting of the preliminary injunctive relief requested.

B. ICC's motion to preliminary enjoin prosecution of New Jersey state court actions commenced by Fairfield General and Skyways

6. Plaintiff has demonstrated for purposes of the pending motions that the wrongdoings alleged in the complaint were accomplished by a transaction or transactions within the meaning of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and this Court, therefore, has jurisdiction of this action under Section 27 of the 1934 Act.

7. The preliminary injunctive relief requested is necessary in order to enjoin the continuation of the frauds and violations of the Securities Exchange Act of 1934 alleged in the complaint and, therefore, is expressly authorized by the said Act and is necessary in aid of the exclusive jurisdiction upon this Court by said Act.

C. ICC's motion to preliminary enjoin the prosecution of the New Jersey state court actions commenced by Vesco & Co.

8. Plaintiff has demonstrated for purposes of the pending motions that the wrongdoings alleged in the complaint were accomplished by a transaction or transactions within the meaning of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and this Court, therefore, has jurisdiction of this action under Section 27 of the 1934 Act.

9. The action commenced by Vesco & Co. constitutes a collateral attack on the Final Judgment of Permanent Injunction. Appointment of Special Counsel and Directors entered by this Court in the action entitled Securities and Exchange Commission v. Robert L. Vesco, et al., 72 Civ.

5001 (CES) and, therefore, the preliminary injunctive relief requested is necessary in order to protect and effectuate said judgment.

D. Motion by Vesco & Co. for dismissal of the complaint for lack of subject matter jurisdiction and lack of personal jurisdiction

10. The complaint states a claim against Vesco & Co. for violation of the 1934 Act, and, therefore, this Court has subject matter jurisdiction with respect to said claims.

11. Proper service having been made upon Vesco & Co., this Court has jurisdiction over its person.

E. Motion by defendant Eisenhauer to dismiss the complaint for lack of subject matter jurisdiction and lack of personal jurisdiction

12. The complaint states a claim against defendant Eisenhauer for violation of the 1934 Act and, therefore, this Court has subject matter jurisdiction with respect to said claims.

13. Proper service having been made upon defendant Eisenhauer, this Court has jurisdiction over his person.

Dated: New York, New York, July 2, 1973

DAVID M. BUTOWSKY, ESQ.
230 Park Avenue
New York, New York
725-5360

SHEA, GOULD, CLIMENKO & KRAMER

By: /s/ Shirley D. A—
A Member of the Firm
330 Madison Avenue
New York, New York
661-3200

Attorneys for Plaintiff

Excerpts from Complaint

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2518

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

vs.

ROBERT L. VESCO, HARRY L. SEARS, FRANK G. BEATTY, NORMAN LeBLANC, STANLEY GRAZE, MILTON F. MEISSNER, ULRICH J. STRICKLER, RICHARD E. CLAY, WILBERT J. SNIPES, FREDERIC J. WEYMAR, GILBERT R. J. STRAUB, C. HENRY BUHL, III, RALPH P. DODD, ALWYN EISENHAUSER, GEORGE PHILLIPE, JOEL GRADY, SHIRLEY BAILEY, VESCO & CO., I.O.S. LTD., BAHAMAS COMMONWEALTH BANK, INTERNATIONAL BANCORP, KILMOREY INVESTMENTS LTD., VALUE CAPITAL, LTD., GLOBAL HOLDINGS LTD., GLOBAL FINANCIAL, LTD., BUTLERS BANK LTD. (now known as WHO Holdings Ltd.), ALLAN J. BUTLER, BANK CANTRADE LTD., FAIRFIELD AVIATION CORPORATION, FAIRFIELD GENERAL CORPORATION, SKYWAYS LEASING CORPORATION and MARINE MIDLAND BANK,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon SHEA GOULD CLIMENKO & KRAMER plaintiff's attorney, whose address is 330 Madison Avenue, New York, N. Y. 10017, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you

fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ T. E. Andrews
T. E. ANDREWS
Clerk of Court.

/s/ B. Edwards
B. EDWARDS
Deputy Clerk.

Date: New York, New York
June 7, 1973 [Seal of Court]

COMPLAINT

Plaintiff, by its attorneys David M. Butowsky and Shea Gould Climenko & Kramer, for its complaint herein, alleges upon information and belief:

APPLICABLE TO ALL COUNTS

1. Plaintiff brings this action to recover money damages and other relief by reason of defendants' violation of various provisions of the Securities Exchange Act of 1934 (15 U.S.C. §§78a et seq.) and the rules and regulations adopted and promulgated thereunder and by reason of defendants' breach of various state law and common law duties owed by defendants to plaintiff.

2. This Court has jurisdiction of the action by reason of §27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa) and the principles of pendent jurisdiction.

3. The acts and transactions complained of herein occurred, among other places, within the Southern District of New York.

4. Plaintiff, International Controls Corp. ("ICC") is a Florida corporation which has its principal place of business in Fairfield, New Jersey. It is engaged in various diversified business enterprises, and it has plants and offices throughout the United States. The common stock and warrants of ICC are listed on the American Stock Exchange.

5. (a) Defendant Robert L. Vesco ("Vesco") is a United States citizen who, at times relevant to this complaint, by reason of his ownership of more than 24% of ICC's outstanding stock, controlled and dominated ICC, and also, at various times, controlled and dominated defendants IOS, Ltd. and its subsidiaries, and Fairfield General Corporation and its subsidiaries. At times relevant to this complaint, Vesco has served as chairman of the board of directors, chief executive officer of and consultant to plaintiff ICC; chairman of the board of directors, chairman of the finance and member of the executive committees of defendant IOS; a director of defendant Bahamas Commonwealth Bank; director of defendant International Bancorp; director and president of defendant Value Capital; a director of defendant Fairfield General Corporation; president and a director of Fairfield Aviation Corporation; and vice president and a director of Skyways Leasing Corporation.

(b) Defendant Frank G. Beatty ("Beatty") is a United States citizen who, at times relevant to this complaint, has served as executive vice president—administrative and finance, treasurer, acting chief executive officer and a director of plaintiff ICC; president, vice president, treasurer and director of defendant Fairfield General Corporation; vice president, treasurer and a director of Fairfield Aviation Corporation; vice president, treasurer and a director of defendant Skyways Leasing Corporation as well as vice president, treasurer and a director of defendant Value Capital Ltd.

(c) Defendant Harry L. Sears ("Sears") is a United States citizen who, at times relevant to this complaint, was an attorney representing defendant Vesco and a director of plaintiff ICC.

(d) Defendant Norman LeBlanc ("LeBlanc") is a Canadian citizen. At times relevant to this complaint, he has served as executive vice president, chief financial officer and director of defendant IOS, director of defendant International Bancorp, president and director of defendant Global Holdings, president and director of defendant Global Financial, and president, treasurer and purported shareholder of defendant Kilmorey Investments.

(e) Defendant Stanley Graze ("Graze") is a United States citizen who, at times relevant to this complaint, has served as portfolio manager for various mutual funds managed by defendant IOS, including Venture Fund (International) N. V. ("Venture Fund"), Fund of Funds Ltd. ("Fund of Funds"), IIT, an International Investment Trust ("IIT") and Transglobal Growth Fund, Ltd. ("Growth Fund"). He purportedly was a shareholder of defendant Kilmorey Investments.

(f) Defendant Milton F. Meissner ("Meissner"), among other things, is a United States citizen who, at times relevant to this complaint has served as executive vice president, president and director of defendant IOS, and was a purported shareholder of defendant Kilmorey Investments.

(g) Defendant Ulrich J. Strickler ("Strickler") is a Swiss citizen. At times relevant to this complaint, he has served as consultant to and director of defendant IOS, president and director of an ICC subsidiary, and director, officer and purported shareholder of Kilmorey Investments.

(h) Defendant Richard E. Clay ("Clay") is a United States citizen, who, at times relevant to this complaint, has served as vice president—office of the chairman of plaintiff ICC; vice president and a director of defendant International Bancorp; director of defendant Bahamas Commonwealth Bank; president and a director of defendant Value Capital; vice president, secretary and director of defendant Fairfield General Corporation; and vice president, secretary and a director of Skyways Leasing Corporation.

(i) Defendant Wilbert J. Snipes ("Snipes") is a United States citizen who, at times relevant to this complaint, has served as a director of plaintiff ICC, director of defendant Bahamas Commonwealth Bank, and senior vice president of American National Bank & Trust of New Jersey.

(j) Defendant Frederic J. Weymar ("Weymar") is a United States citizen who, at times relevant to this complaint, has served as managing director of defendant Butlers Bank, president and director of defendant International Bancorp, and a director of defendant Bahamas Commonwealth Bank.

(k) Defendant Gilbert R. J. Straub ("Straub") is a United States citizen who, at times relevant to this complaint has served as director of European Services for plaintiff ICC, a director and senior vice president of defendant Bahamas Commonwealth Bank, and a director and senior vice president of defendant International Bancorp.

(l) Defendant C. Henry Buhl, III, ("Buhl") is a United States citizen who, at times relevant to this complaint, has served as director of defendant IOS, and director of Fund of Funds, Growth Fund, Venture Fund and their respective management companies.

(m) Defendant Ralph P. Dodd ("Dodd") is a United States citizen who, at times relevant to this complaint was president and a director of defendant Fairfield General Corporation and vice president and a director of ICC.

(n) Defendant Alwyn Eisenhauer ("Eisenhauer") is a United States citizen who, at times relevant to this complaint, was known as "director of Aviation" of plaintiff ICC but, in reality, he was defendant Vesco's personal pilot.

(o) Defendant George Phillipe ("Phillipe") is a Swiss citizen who, at relevant times, was an officer and director of defendant Bank Cantrade.

(p) Defendant Joel Grady ("Grady") is a United States citizen who, at times relevant to this complaint, was president and a director of Skyways Leasing Corporation, president and a director of Fairfield Aviation Corporation and vice president and a director of Fairfield General Corporation.

(q) Defendant IOS Ltd. ("IOS") is a nonresident Canadian corporation which is or was engaged in holding a complex of mutual fund management companies, companies engaged in managing real estate investment companies, insurance companies, and various banks. IOS, in December 1971, in exchange for securities of defendant Value Capital, most of which were subsequently distributed to IOS shareholders, transferred to Value Capital certain insurance and real estate management companies and other assets of IOS. IOS, in October 1971, in exchange for certain securities of defendant International Bancorp, most of which were subsequently distributed to IOS shareholders, transferred to International Bancorp various of its banking assets including Orbis Bank GmbII, Overseas Development Bank Geneva, Overseas Development Bank Luxembourg, Overseas Development Bank Bahamas and Overseas Development Bank Curacao.

(r) Defendant Vesco & Co. ("Vesco & Co.") is a Delaware corporation, to which defendant Vesco and his children have transferred certain of their assets.

(s) Defendant Bahamas Commonwealth Bank Ltd. ("Bahamas Commonwealth Bank") is a Bahamian corporation whose principal executive offices are located in Nassau, Bahamas.

(t) Defendant International Bancorp Ltd. ("International Bancorp") is a Bahamian corporation with its principal executive offices in Nassau, Bahamas. It is a holding company for various banking assets spun-off by defendant IOS (as described in paragraph 5(q) above), and it also owns a majority of the outstanding common stock of the Bahamas Commonwealth Bank.

(u) Defendant Kilmorey Investments Ltd. ("Kilmorey Investments") is a Bahamian corporation which, on or about March 30, 1972, acquired from ICC certain former ICC subsidiaries which held certain shares of preferred and common stock of defendant IOS.

(v) Defendant Value Capital Ltd. ("Value Capital") is a Bahamian corporation which was formed in December 1971 and became the receptacle of various insurance and real estate management companies and other assets of IOS (as described in paragraph 5(q) above).

(w) Defendant Global Holdings, Ltd. ("Global Holdings") is a Bahamian corporation which holds the outstanding stock of Global Financial Ltd.

(x) Defendant Global Financial Ltd. ("Global Financial") is a Bahamian corporation which holds certain securities of defendant Value Capital, defendant International Bancorp and defendant Kilmorey Investments, which were acquired from ICC in June 1972.

(y) Defendant Butlers Bank, Ltd. ("Butlers Bank") is a bank formed under the laws of the Bahamas.

(z) Defendant Bank Cantrade Ltd. ("Bank Cantrade") is a bank formed under the laws of Switzerland.

(aa) Defendant Fairfield Aviation Corporation ("Fairfield Aviation") is a New Jersey corporation which was engaged in the general aviation business. On October 18, 1967, ICC acquired all of the issued and outstanding shares of Fairfield Aviation.

(bb) Defendant Fairfield General Corporation ("Fairfield General") is a New Jersey corporation organized on November 19, 1971, as a wholly-owned subsidiary of ICC which on December 9, 1971 acquired from ICC all of the outstanding stock of Fairfield Aviation. Pursuant to a registration statement filed on Form S-1 with the Securities and Exchange Commission on December 14, 1971, all of the stock of Fairfield General was distributed as a dividend in kind to the shareholders of ICC.

(cc) Defendant Skyways Leasing Corporation ("Skyways") was incorporated in New Jersey on December 23, 1970 and is a wholly-owned subsidiary of Fairfield Aviation. Its sole business is the ownership and operation of a Boeing 707 airplane.

(dd) Defendant Shirley Bailey ("Bailey") is a United States citizen who, at times relevant to this complaint, was secretary of ICC and Vesco's personal secretary.

(ee) Defendant Marine Midland Bank ("Marine Midland") is a banking corporation with offices in the Southern District of New York. Marine Midland was the transfer agent and paying agent for the dividend in kind described in paragraph 5(bb).

(ff) Defendant Allen J. Butler ("Butler") is a Bahamian citizen who, at times relevant to this complaint, was, among other things, president of defendant Butlers Bank.

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Statute Involved

SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. §78aa PROVIDES:

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under chapter brought by or against it in the Supreme Court or such other courts.

SECTION 10 OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. §78j (1964)

Section 10 of the Securities Exchange Act of 1934 provides in pertinent part [15 U.S.C. §78j(b)]:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
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> • • •
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> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appreciate in the public interest or for the protection of investors.

Regulation Involved

Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. §240.10b-5 (1964).

Rule 10b-5, promulgated by the Securities and Exchange Commission pursuant to the authorization contained in Section 10(b) of the Securities Exchange Act of 1934, provides:

It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.